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IN THE

Supreme Court of the United States

October Term, 1994

JACOB FRAIDIN, et al.,

Petitioner,

v.

ANDRE R. WEITZMAN, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR A WRIT OF CERTIORARI

Jacob Fraidin
3406 Fielding Road
Baltimore, Maryland
21208
(410) 484-2520
Pro Se

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

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QUESTIONS PRESENTED

1. Do the due process standards as to punitive damages, enunciated by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, require that new evidence concerning a defendant's financial condition be considered at any new hearing or new trial on damages, particularly if there has been a change in that condition since the original damage award?

2. Did the punitive damages figure entered at the remand hearing in this matter comply with due process requirements, especially in view the conduct supposedly supporting such damages?

3. Was the punitive damage award so excessive as to violate due process?

PARTIES TO THE PROCEEDING

The parties to the proceeding, including those noted in the caption of this case, are:

Jacob Fraidin, Petitioner,

Pacific Mortgage and Investment Group, Ltd. (a party to the previous matters but not a Petitioner here),

North American Credit Corporation (a party to the previous matters but not a Petitioner here),

Andre Weitzman, Respondent,

Sheldon Braiterman, Respondent, and

Braiterman and Weitzman, P.A., Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

JACOB FRAIDIN

Petitioner,

v.

ANDRE R. WEITZMAN, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Jacob Fraidin, proceeding pro se, under appropriate rules of this Court, requests that this Court issue of writ of certiorari to the Court of Special Appeals of Maryland.

OPINIONS BELOW

The case was decided by the Court of Special Appeals on March 29, 1994 (*Jacob Fraidin, et al. v. Andre Weitzman, et al.* Court of Special Appeals, No. 935, September Term, 1993). The opinion is set forth in full in the Appendix to this Petition, beginning at App. 1a.

The remand hearing on punitive damages before the Circuit Court for Baltimore City, which followed an earlier appeal after the initial trial of this matter, was held on February 25, 1993. (See App. 51a et seq.). At the conclusion of that hearing, the Circuit Court determined that the punitive damages would be reduced by half.

The matter originally arises from a jury trial in the Circuit Court for Baltimore City on a multi-count Complaint by Respondents Andre Weitzman, Esq. and Sheldon Braiterman, Esq. (as Plaintiffs) against Defendants Jacob Fraidin (Petitioner or Mr. Fraidin) and North American Credit Corporation and Pacific Mortgage & Investment Group, Ltd. (the Corporations) and other Defendants not part of this Petition. The action, brought by the two attorneys, involved efforts by Mr. Fraidin on behalf of himself and the Corporations, to settle a jury verdict against him and those corporations on a claim brought by a husband and wife (through the two attorneys) alleging alleged irregularities in a mortgage loan. The attorneys' action alleged tortious interference with contract and other claims.

The original Complaint by Respondent attorneys was filed February 13, 1986. (The first trial ended in a mistrial). Trial began on September 18, 1990. Petitioner and the Corporations, on December 20, 1990, after a trial which took 29 days, were assessed compensatory damages of $183,474.93. In a later punitive damages proceeding, the jury on January 18, 1991 assessed punitive damages against Petitioner and the Corporations of $3 million--$2.5 million in favor of Mr. Weitzman and $500,000 in favor of Mr. Braiterman.

Various post-judgment motions and other matters followed. On May 3, 1991, the Circuit Court denied the post-judgment motions. Appeal to the Court of Special Appeals of Maryland proceeded, raising numerous issues, including the propriety of punitive damages.

On August 9, 1991, while the appeal was pending, Mr. Fraidin *filed a petition for bankruptcy and mailed a notice of this filing and stay to the Court of Special Appeals.* The Court, on August 19, 1991, stayed further proceedings against him. On September 26, 1991 a Motion for Relief from Automatic Stay to

Pursue Appeal was granted by the Bankruptcy Court. The Court of Special Appeals subsequently ordered on October 15, 1991, that the appeal and other matters shall proceed.

On September 4, 1992, the Court of Special Appeals issued its opinion in *Fraidin v. Weitzman*, 93 Md.App. 168, 611 A.2d 1046 (1992). Numerous issues were reviewed which are not part of this Petition. As to punitive damages, the Court determined due process requirements were not met in the award, *which, as the Court remarked, equalled Mr. Fraidin's net worth even by the most generous view of the evidence* ***at the time of trial***. The award thus was remanded to the Circuit Court.

The Court of Special Appeals affirmed the jury verdict as to liability and as to compensatory damages. However, it remanded the punitive damages award to the Circuit Court for Baltimore City. The Court of Special Appeals concluded the punitive damages did not conform to applicable due process standards. The remand was for a new proceeding on that issue.

The Court of Special Appeals' mandate in that earlier appeal was issued October 5, 1992. Petitioner and the Corporations submitted to the Court of Appeals of Maryland a petition for a writ of certiorari, on other issues the matter. That petition was denied on January 14, 1993.

On remand as to punitive damages, the Circuit Court (Hon. Thomas E. Noel, J.) *did not conduct a new trial*. Instead, on February 25, 1993, it conducted a hearing at which it declined to consider certain new evidence--that is, the fact that Mr. Fraidin had in the interim filed for bankruptcy, which did not exist at the time of the jury's January 18, 1991 punitive damages award.

The Circuit Court decided the punitive damages award would be reduced by half. It issued an Order remitting any punitive damages in excess of $1,250,000 for Mr. Weitzman and any punitive damages in excess of $250,000 for Mr. Braiterman.

This prompted a second appeal by Mr. Fraidin and the corporations to the Court of Special Appeals of Maryland on the propriety of the Circuit Court's actions on remand. The Court of Special Appeals on March 29, 1994 issued its opinion. (*Jacob Fraidin, et al. v. Andre Weitzman*, et al. Court of Special Appeals, No. 935, September Term, 1993 (unreported)).

The Court of Special Appeals affirmed the Circuit Court. The Court's mandate was issued April 28, 1994.

Petitioner and the Corporations then applied to the Court of Appeals of Maryland for a writ of certiorari. That petition was denied by the Court of Appeals on September 14, 1994.

GROUNDS FOR JURISDICTION

The Court of Special Appeals issued its opinion on March 29, 1994. Petitioners timely submitted a petition for a writ of certiorari to the Court of Appeals. That petition was denied on September 14, 1994.

In accordance with Rule 13.3 of this Court, this Petition was timely filed within 90 days of the September 14, 1994 denial by the Court of Appeals of the petition to that Court for a writ of certiorari.

The jurisdiction of this Court is invoked through 28 U.S.C. Sec. 1257(a).

STATUTES OR PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. Statement of Material Facts

This matter concerns an involved background and extensive procedural history. A general description will suffice to provide a context for the issues in this Petition.

1. Previous Action Challenging Loan

The scenario began with a $10,000 loan to Ray Dorman and Margarette Dorman ("the Dormans") by North American Credit Corporation. The loan was brokered by Pacific Mortgage & Investment Group, Ltd. and secured by a mortgage held by North American. Both entities are managed by Jacob Fraidin.

After the loan was paid, the Dormans decided it, and the interest charged for it, were improper. In May of 1982, they retained Sheldon H. Braiterman, P.A. ("Braiterman") and Andre R. Weitzman ("Weitzman") to take legal action on their behalf against Fraidin and the Corporations concerning the loan. At that time, Weitzman was part of Braiterman's law firm, Braiterman & Johnson, P.A.

The Dormans executed a power of attorney and contingent fee arrangement ("the Contract"). Mr. Weitzman left Braiterman & Johnson and started his own firm in April, 1985. Eventually, a new contract, dated April 10, 1985, was arranged between Weitzman and the Dormans. This essentially was the same as before, but it appointed only Weitzman as the attorney.

An action challenging the $10,000 loan was filed on behalf of the Dormans against Fraidin and the Corporations. Fraidin, Pacific, and North American Credit were represented by Melvyn Weinstock and his firm, Weinberger, Weinstock, Sagner, Stevan & Harris. On September 23, 1985, after a three-day trial, the jury returned a verdict against Fraidin and the Corporations of $66,949.86 in compensatory damages and $300,000 in punitive damages. Post-trial motions were denied on November 7, 1985.

2. Fraidin's Settlement with Dormans

Following this verdict, Fraidin wished to settle the matter, and was of the opinion the Dormans were open to settlement. Fraidin (without attorney Weinstock) met with Weitzman and Braiterman on November 1, 1985 as to settlement. Fraidin offered to settle the judgment for $100,000 over five years or $60,000 payable immediately. This offer was not accepted. Nor was it communicated by Weitzman to the Dormans.

On November 12, 1985, Fraidin hired Gordon, Feinblatt, Rothman, Hoffberger & Hollander for post-judgment matters and to advise him of his options in view of the judgment. Lawrence D. Coppel of that firm reviewed the case and met with Fraidin. Weinstock continued to be involved as counsel.

In mid-November, 1985, there were further contacts about settlement or other matters between either Fraidin or Weinstock and Braiterman or Weitzman. Eventually, there was direct contact between Fraidin and the Dormans. On November 25, 1985, Dorman left a message at Weinstock's office that he just wanted his money and he wanted to settle. Weinstock told Fraidin and Weitzman about this call. Fraidin requested advice on the matter and was informed by Weinstock and Coppel that he could deal directly with the Dormans.

On November 27, 1985, Fraidin contacted the Dormans to set up a meeting about settlement. The Dormans told Weitzman of this meeting, although Weitzman advised Dorman not to meet with Fraidin if Weitzman was not present.

It appeared the Dormans, dissatisfied with the treatment they had received by Weitzman, had determined to discharge him as their counsel before any meeting between them and Fraidin--although this remains disputed by Respondents. In any event, the Dormans arranged to meet Fraidin directly.

On Thanksgiving Day, 1985, Fraidin met with the

Dormans at a bar in East Baltimore. Weitzman was not present. Fraidin and the Dormans discussed settlement possibilities. On November 28, 1985, Fraidin met with Mr. Dorman and with Weitzman at a fast food restaurant. That meeting did not produce a settlement. Several days after, Fraidin met with the Dormans again at the East Baltimore bar. Weitzman, initially, was not present, but he appeared and attempted to break up the meeting.

On December 4, 1985, the Dormans sent a letter discharging Weitzman and Braiterman. On December 6, 1985, Weitzman met with Mr. Dorman and obtained a statement disclaiming that letter and confirming case had not been settled.

Nevertheless, settlement did take place between Fraidin and the Dormans directly. On December 9, 1985, the Dormans settled with Fraidin for $50,000 cash. On December 8, Fraidin had informed Weitzman that Fraidin and the Dormans were going to settle the case the next day and told Weitzman that he, Weitzman, was welcome to attend that meeting.

Attorneys for Mr. Fraidin or for the Dormans were not present at settlement. However, a notice of satisfaction of judgment was executed by the Dormans and later was filed with the court, on December 10, 1985. The Dormans reaffirmed their December 4 written discharge of Weitzman and Braiterman.

3. Challenge to Settlement

Upon learning of the settlement, Weitzman and Braiterman, on December 11, 1985, filed a motion to set it aside. On December 14, 1985, the Dormans wrote to Weitzman and reaffirmed their termination of his services.

A hearing on the motion to set aside the settlement was conducted on December 26, 1985 (J. William Hinkel, J.). The hearing was extensive and all counsel involved were present. Ms. Dorman testified the settlement was voluntary and that the Dormans were satisfied with it.

On January 10, 1986, Judge Hinkel denied the motion by the attorneys to set aside the order of satisfaction. There was no appeal. *This should have ended the matter.*

4. Underlying Action by Weitzman/ Braiterman Against Fraidin, et al.

However, on February 13, 1986, Weitzman, along with Braiterman and Johnson, P.A. initiated an action in the Circuit Court for Baltimore City against: the Dormans, Fraidin, the Corporations, Weinstock and his firm, and Coppel and his firm. The multi-count Complaint alleged: breach of contract, quantum meruit fee, fraud, conspiracy, and tortious interference with contract. It sought compensatory and punitive damages.

Trial on this Complaint did not commence until January, 1990. However, that trial ended in a mistrial.

A second trial began on September 18, 1990. This trial would take up 29 days. The eventual result of the trial was in favor of the Plaintiff attorneys. The jury verdicts were:

on Count I (breach of contract against Dormans): $25,000 (one half of the settlement figure arrived at between Fraidin and the Dormans--$12,500 to each Plaintiff), plus interest;

on Count IV (interference with contract as to Fraidin, the Corporations, and their counsel): no liability as to counsel, but damages against Fraidin and the Corporations of $183,474.93 (one half of the award in the original suit--$91,737.47 for each Plaintiff), plus interest, and

on Count V (civil conspiracy as to all defendants): liability as to the Dormans, Fraidin and Corporations, but not their counsel. However, no damages awarded.

Exemplary damages were assessed on Counts IV and V. The jury in a later proceeding on punitive damages of January 18, 1991 awarded punitive damages against Fraidin and the Corporations which totalled $3,000,000: $2,500,000 for

Weitzman, and $500,000 for Braiterman.

Post-judgment motions were denied on May 3, 1991. Fraidin and the Corporations then appealed to the Court of Special Appeals, raising various issues regarding the trial.

5. Appeal, Remand on Punitive Damages

The Court of Special Appeals, on appeal from this extensive trial, undertook a detailed review of numerous issues. The bulk of this discussion is not relevant to this present Petition and need not be recited here. See *Fraidin v. Weitzman*, 93 Md.App. 168, 611 A.2d 1046 (1992), *cert.den.*, 329 Md. 109, 617 A.2d 1055 (Bishop, J.).

In general, the verdict was affirmed. The sole matter remanded to the Circuit Court was the punitive damages.

On that issue, Fraidin disputed the conclusion that the evidence was sufficient to support a finding of malice by him against Weitzman and Braiterman. The basis for that conclusion (see App. 27a et seq., 93 Md.App. at 203-204) supposedly was that Fraidin induced the Dormans to discharge Weitzman and Braiterman. However, there was evidence that the Dormans already were dissatisfied with Weitzman and Braiterman before they ever met with Fraidin, and that the Dormans had discharged them before any contact or meeting with Fraidin.

Thus, Petitioners contended that at the time of the discussions between Fraidin and the Dormans to settle the judgment in the Dormans' original suit challenging their loan, there was no attorney-client relationship from which any malice could be inferred by Fraidin against Weitzman or Braiterman. Fraidin's interest was simply to see if the Dormans would settle. If they wished to do so and if Weitzman and Braiterman--no longer in an attorney-client relationship but wishing to protect their fee--attempted to prevent such a settlement, then Weitzman and Braiterman, and not Fraidin, were the tortious actors. This

dispute clearly affects the matter of Fraidin's "malice."

The Court of Special Appeals determined that sufficient "malice" in the legal sense could be found by the jury based on these circumstances. The remand as to punitive damages was in light of due process standards described by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). (For a further discussion in Maryland as to these standards, see *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 88 Md.App. 672, 596 A.2d 687 (1991), *cert.den.*, 326 Md. 435, 605 A.2d 137).

The Court of Special Appeals found that, as to these standards, any punitive damages award meeting due process requirements ***must relate to the defendant's ability to pay***. The Court stated, at App. 37a, 93 Md.App. at 211 [emphases supplied]:

> What disturbs us about the award in the case sub judice is not the particular amount of the award, but its proportion to appellant's wealth. Evidence regarding appellant's net worth was controverted. Information prepared by Fraidin, for litigation purposes, placed his personal wealth at $250,000, and the Corporations' in the red as of June, 1990. Fraidin's sworn application to the Western Surety Company, introduced by Braiterman, P.A. and Weitzman, showed Fraidin's net worth (including corporate assets) to be over $3,000,000, as of June 1985. Fraidin did not produce copies of his income tax returns for 1988, 1989, or 1990. The jury was entitled to reach its own conclusions regarding appellants' net worth; however, no estimates appear to be higher than in the area of $3,000,000. *Thus, the $3,000,000 punitive award was essentially equivalent to the maximum approximation of appellants' net worth.*

The Court of Special Appeals continued at App. 37a:

> When a punitive damage award consumes a defendant's total wealth, it has ceased to serve the societal goal of punishment. *A defendant need not be financially destroyed in order to be punished.*

Reviewing other authority on punitive damages, a defendant's financial condition, and proportionality (App. 37a-40a, 93 Md.App. at 212-215), the Court stated at App. 42a, 93 Md.App. at 216 [citations omitted, emphases supplied]:

> Therefore...we hold that although punitive damages are appropriate in the case sub judice, the jury did not properly consider appellants' wealth in making its punitive damage award. Upon its review of the amount of the award, the trial court did not 'assure that the size of the award [would] "accomplish society's goals,"' and disregarded the disastrous consequences the award would have on appellants' future existence. *Had the trial court considered appellants' net worth, it would have required a remittitur, or ordered a new trial on the amount of punitive damages. Consequently, the punitive damage award does not comport with due process because the award 'fails to serve its proper purpose' and exceeds 'an amount that will accomplish society's goals of punishment and deterrence.'*

The Court remarked that, as to its determination on the punitive damages award, it could take one of three potential actions: 1) modify the award on its own, either directly or by ordering a new punitive damages trial; 2) vacate the award and remand for reconsideration by the trial judge, or 3) vacate and direct a new trial. Taking the second option, this Court concluded at App. 43a, 93 Md.App. at 217:

> Because the trial court did not consider appellants' net worth during its review of the jury's punitive damages award, we shall vacate the award and

> remand the case to the trial court for its reconsideration of granting a remittitur, or if rejected, a new trial.

In the event of a new trial on punitive damages, the Court added, along with instructions in the original trial, the Circuit Court [see App. 44a, 93 Md.App. at 218, emphasis retained]:

> shall... include an instruction by which the jury is advised that the amount of the punitive damage award should represent an appropriate punishment to appellants taking into account, as a limiting factor, evidence of their financial status. To this end, the jury may only *punish* appellants for their conduct, *not destroy or bankrupt them.*

With this directive, the punitive damages matter was remanded. The Court then discussed various issues not involved in this present appeal (see 93 Md.App. 218-239).

6. Punitive Damages Proceeding on Remand

At the February 25, 1993 hearing on punitive damages, Fraidin maintained that, consistent with the Court of Special Appeals directive in its remand on the issue, *a new trial* on punitive damages was appropriate. And any new trial *or* any other remand proceeding on the issue must consider *any additional evidence concerning the defendant's financial status* in order to determine any appropriate punitive damages award.

Weitzman and Braiterman contended no new evidence could be introduced because the proceedings were in the nature of a motion for remittitur. Petitioner and the Corporations had submitted a request for remittitur along with other post-trial request for relief (new trial, etc.) after the jury verdict in the original trial. But no such motion was pending at the time of the February 25, 1993 proceeding.

At the February 25 remand proceeding, Fraidin reminded

the Court that his bankruptcy was still active. He stated the Bankruptcy Examiner was in Court and was prepared to testify as to Fraidin's financial condition, with documentation.

After further argument by the parties, the Court remarked (App. 82a-84a):

> Mr. Fraidin had made a comment with respect to alleging that the Plaintiffs in this case are not interested in what the independent bankruptcy investigator would have to say, because it would be supportive of his position. I don't know that that's necessarily accurate, because Mr. Fraidin, I believe that there is a body of law that does govern situations such as this.
>
> We had a very lengthy, involved trial in this case, and I don't think it proper to go beyond the evidence that was adduced at that trial.
>
> * * *
>
> I would be most interested in hearing what the investigator would testify to, but I don't feel it is proper.
>
> Any conduct of yours, Mr. Fraidin, with respect to Mr. Weitzman and Mr. Braiterman in this case as to the issue of malice has already been resolved. The jury made a finding, the Court of Special Appeals has affirmed it.
>
> The jury also heard conflicting controverted evidence regarding your net worth.
>
> The jury seemed to feel that there was -- that you were worth substantially more than the evidence you produced.

> It is --when I calculated the compensatory award, I believe it came out to the penny of what the attorney fee would have been in the underlying case, and I think the three million dollar figure was probably a same or similar calculation by the jury that came to the amount of your testified to worth or one bit of evidence that did, in fact, come in.
>
> So I am not -- I am of the opinion, and I do find that in a remittitur hearing I am bound by what occurred at trial, and I am not permitted to go beyond that, so that is what I will limit my finding to, the evidence that was adduced during the very lengthy and interesting trial that we had here... .
>
> Now, the question is, how do we proceed.
>
> * * *
>
> Now, during the trial, as the court has pointed out, the evidence concerning your net worth went across the spectrum. As a matter of fact, the testimony was that the corporations were operating in the red.
>
> Now, I am willing to listen to arguments based on the evidence that was, in fact, adduced at trial, or I can make my ruling having sat through almost two trials involving this set of circumstances. ...

The parties then offered additional argument. Mr. Fraidin, for his part, stated evidence that was submitted at the trial and which purported to show his net worth was $3,000,000 was not introduced by him and was "vehemently objected to."

He stated, "There is no evidence in this case that shows that Fraidin's net worth in 1990, 1991, or 1992 is anywhere near what the plaintiffs would have this Court believe, and they have had two years in which to substantiate it to this Court." He

remarked, "I am here cut open. I have been dissected, I have been in bankruptcy for two years." (App. 87a).

The Court then ruled, at App. 90a:

> Mr. Fraidin makes a very legitimate point when he raises the issue of at what point in time should a defendant's net worth be determined for purposes of assessing punitive damages.
>
> * * *
>
> Unfortunately, as the Court of Special Appeals pointed out, I didn't give the jury complete instructions, but bear in mind, this is somewhat of a novel question in Maryland, and according to Judge Bishop, as I understand, this may have been the first case to really address directly the due process issue in Maryland.
>
> So as to whether or not we must affix a point in time to then determine what Mr. Fraidin's net worth would be, we do not have absolute direction, but it is a matter of legitimate concern, but the evidence in the trial ran the gamut concerning Mr. Fraidin's net worth in terms of the amount and time. We heard evidence ranging from 1981 through several years.
>
> * * *
>
> So the jury made the best decision they could from all of the evidence, but I point out when it was convenient for Mr. Fraidin to have a low net worth he could produce documentation to that effect, and when it was convenient for Mr. Fraidin to have a substantial net worth, he could produce documentation to that effect. So I imagine the jury had a rather difficult decision to make.

> I differ from [Plaintiffs's suggestion] that the degree of malice should be considered as a factor in determining the amount in order to be remitted.
>
> * * *
>
> What I am going to do is require the Plaintiffs to remit one half of the punitive damages with respect to Mr. Weitzman and one half of the punitive damages with respect to Mr. Braiterman, Sheldon Braiterman, P.A.

The Circuit Court thus determined the punitive damages against the Petitioners/Defendants (Jacob Fraidin, Pacific Mortgage and Investment Group, Ltd. and North American Credit Corporation) would be assessed at $1,500,000 on behalf of Plaintiff/Respondent Weitzman and $250,000 on behalf of Plaintiff/Respondent Braiterman. An Order to that effect was issued on February 25, 1993.

B. Decision by the Court of Special Appeals

The Court of Special Appeals, on Petitioners' appeal from the remand proceeding on punitive damages, affirmed the Circuit Court. (*Fraidin v. Weitzman*, Court of Special Appeals, No. 935, March 29, 1994, September Term, 1993 (unreported) ["*Fraidin II*"].

The Court stated (App. 6a):

> In our view, Fraidin misunderstood our mandate in *Fraidin I*. As Fraidin apparently saw it, our mandate required the trial court to base its remittitur upon evidence of Fraidin's current net worth. We point out to Fraidin that if that was what we had intended, our mandate would have said so. The jury's award of punitive damages was based upon evidence considered by the jury at trial.

The Court of Special Appeals continued:

> Thus, it would have been inappropriate for the trial court to have granted its remittitur based upon evidence other than that considered by the jury. In short, the trial court complied with our mandate. There was no error.

As to the excessiveness of a punitive damages award of $1.5 million against an individual for a tortious interference claim, where the second-highest punitive damages award to date was against a major corporation for environmental pollution, the Court of Special Appeals stated (App. 8a) [emphasis supplied, citation omitted]:

> [W]e shall not entertain Fraidin's argument that the award was excessive because it is not proportionate to his reprehensible conduct. We made it clear in *Fraidin I* that, although the award was quite high, it violated due process only because it consumed Fraidin's entire net worth.
>
> Thus, we are here concerned only with whether the reduced award of $1.5 million is excessive in proportion to Fraidin's net worth. We have recognized that 'the granting or refusal of a remittitur is largely within the discretion of the trial judge.' In *Fraidin I*, we reviewed the trial court's denial of Fraidin's motion for remittitur and concluded that the trial court had erred in not instructing the jury to consider an award of punitive damages only in proportion to the evidence before it of Fraidin's net worth. On remand, we expressly directed the trial court to reconsider Fraidin's motion for remittitur on this basis.

The Court of Special Appeals continued (see App. 8a):

> We know of no formula or standard for equating an award of punitive damages in proportion to a defendant's net worth. In remanding *Fraidin I*, however,

> we made it clear to the trial court that an award of punitive damages that placed Fraidin in bankruptcy does not accomplish the goal of punishing and deterring wrongdoers.

The Court of Special Appeals continued (App. 8a-9a [emphasis supplied]):

> Although we have found no Maryland case saying so, *we think it only logical that the amount in remittitur should be evaluated using an abuse of discretion standard.* The trial court here remitted one half of the jury's award of $3 million. Although the award of punitive damages remains substantial, we emphasize, as we did in *Fraidin I*, that there was evidence before the jury that Fraidin's net worth varied from $225,000 to in excess of $3 million. Accordingly, the trial court did not abuse its discretion in reducing the award of punitive damages to $1.5 million.

The Court of Special Appeals thus affirmed the Circuit Court's remittitur proceeding on remand, assessing punitive damages against Petitioners of $1.5 million.

Petitioners, aggrieved by this decision and contending that due process still had not been afforded them regarding the punitive damages issues in this matter, applied to the Court of Appeals for a writ of certiorari. This petition was denied on September 14, 1994.

REASONS FOR GRANTING WRIT

The Court of Special Appeals side-stepped crucial and far-reaching questions regarding the due process importance of assessing punitive damages by considering *current* evidence of a defendant's *present* net worth. It affirmed a punitive damage award in a contract matter, not involving personal injuries, but which damages are nearly $600,000 greater than punitive

damages assessed against a major corporation for environmental pollution.[1]

I. PUNITIVE DAMAGES REQUIREMENTS, AS WELL AS THE REMAND DIRECTIVE MANDATED THAT A NEW PUNITIVE DAMAGES PROCEEDING SHOULD HAVE BEEN CONDUCTED, IN THE NATURE OF A NEW TRIAL ON PUNITIVE DAMAGES

The Court of Special Appeals gave short shrift to the pivotal issue of the trial court's failure to act consistent with the appellate directive which indicated the necessity of a *new trial* on punitive damages. And the Court of Special Appeals in *Fraidin I* ignored the fact that at the woefully inadequate remand proceeding, the trial court, without adequate explanation or basis, simply reduced by half the jury's $3 million punitive damages award--an award which in itself had no proper relationship to Petitioners' conduct or to any credible evidence of Petitioners' net worth (either before the jury at trial or at the remand proceeding).

The Court of Special Appeals failed to acknowledge that by the language of its own remand directive, the Circuit Court improperly restricted the remand proceeding by considering it merely a hearing on a remittitur. Again, there was no remittitur motion before the Circuit Court. Petitioners may have filed such a motion after the trial, but filed no such motion on remand.

---

[1] See $910,000 punitive damage award assessed against Exxon in *Exxon Corp. v. Yarema*, 69 Md.App. 124, 516 A.2d 990 (1986). The Court of Special Appeals remarked in *Fraidin I* that this was the second-highest punitive damages award allowed to stand by Maryland courts. See *Fraidin I*, 93 Md.App. at 211, citing *Alexander v. Evander*, 88 Md.App. 672, 596 A.2d 687 (1991), *cert.den.* 326 Md. 435, at 88 Md.App. at 720.

The Court of Special Appeals in *Fraidin II* stated its remand directive asked the Circuit Court "to reconsider granting Fraidin's motion for remittitur, or if rejected, a new trial." Thus, according to the Court of Special Appeals, "there was no need for Fraidin to refile the motion for remittitur." (App. 6a, fn. 3). Thus, the Court of Special Appeals was of the opinion that the motion supposedly was still at issue.

Such a conclusion is difficult to reconcile with the circumstances. The appeal concluded all prior trial matters. It would be highly irregular for an appellate court to "direct" a trial court to "reconsider" a motion not before that court.

The Court of Special Appeals' remand directive gave the Circuit Court considerable discretion as to punitive damages. That Court made it clear that it particularly was concerned with the importance of a punitive damage award bearing some relation to Petitioners' financial condition.

In the original appeal, the Court of Special Appeals plainly stated at 93 Md.App. at 216 (App. 42a) [citations omitted, emphases supplied]:

> Upon its review of the amount of the award, the trial court did not 'assure that the size of the award [would] "accomplish society's goals,"'and disregarded the disastrous consequences the award would have on appellants' future existence. *Had the trial court considered appellants' net worth, it would have required a remittitur, or ordered a new trial on the amount of punitive damages.* Consequently, the punitive damage award does not comport with due process because the award 'fails to serve its proper purpose' and exceeds 'an amount that will accomplish society's goals of punishment and deterrence.'

The Court also stated (93 Md.App. at 217) (App. 43a) that, upon remand, the trial court was to "consider appellants' net worth"

and that the court should "reconsider" granting a new trial. Although this statement did not expressly *require* a new trial, it noted additional jury instructions if such a trial occurred.

Thus, the Circuit Court *had the discretion to order a new trial on punitive damages*. Even if no new trial were ordered, the remand clearly required *a new evidentiary proceeding*. The Circuit Court need not view the remand as merely another hearing on any previous remittitur motion.

II. THE CIRCUIT COURT DID NOT COMPLY WITH DUE PROCESS STANDARDS CONCERNING PUNITIVE DAMAGES IN ITS REMAND HEARING

This Court set new guidelines based on due process for punitive damages awards in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

The *Haslip* Court commented that punitive damages "have long been a part of traditional state tort law" 499 U.S. 15, citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984) (and see discussion at 113 L.Ed.2d at 18-20). Yet "unlimited jury discretion--or unlimited judicial discretion for that matter--in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." 499 U.S. 18. This Court reviewed various characteristics of a "sufficiently definite and meaningful constraint" on discretion permitted by traditional means of assessing punitive damages.

While *Haslip* declined to draw a "mathematically bright line" as a measure of all punitive damage awards, it stated 499 US. at 21-22 that a due process consideration of the propriety of a punitive damages award would involve:

--whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the

defendant's conduct as well as the harm which occurred,

--the degree of reprehensibility of the conduct,

--the existence or frequency of similar past conduct, the defendant's awareness of past conduct, and any concealment of such past conduct,

--the profitability to the defendant of the conduct,

--the desirability *of removing that profit* and of having the defendant sustain a loss,

--the defendant's financial position,

--all the costs of litigation,

--any criminal sanctions against the defendant, and

--the existence of other civil awards against the defendant for the same conduct (taken in mitigation).

In *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), a majority of this Court upheld, against a due process challenge, a $10 million award of punitive damages where actual damages were a mere $19,000. Justice Stevens, in his plurality opinion, joined by Chief Justice Rehnquist, Justice Blackmun, and in part by Justice Kennedy, was unwilling to prescribe a "test" for assessing the constitutionality of such damages awards. *Id.* at 2720. Justice Stevens wrote:

> The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of the petitioner, and the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery, and deceit, *and petitioner's wealth*, we are not persuaded that the award was so 'grossly excessive' as to be beyond the power of the State to allow.

Id. at 2722-2723 [emphasis supplied]. Justice Stevens added that evidence of the defendant's "impressive net worth" is among the factors that "are typically considered in assessing punitive

damages" and was included in the factors approved in *Haslip*. *Id.* at 2722 n. 28. He reiterated that in *Haslip* "we referred to the 'financial position' of the defendant as one factor that could be taken into account in assessing punitive damages," and noted that "many States permit the jury to take account of defendant's wealth." *Id.* at 2723. He cited four state cases in support of this last point. *Id.* at 2723 n. 31.

Justice Kennedy, concurring, spoke with approval of the fact that "respondent's attorneys informed the jury of TXO's vast financial resources and argued that TXO would suffer only as a result of a large judgment." *Id.* at 2726.

Due process standards for punitive damages in Maryland (following *Haslip*) were reviewed by the Court of Special Appeals of Maryland, in a decision previous to *Fraidin I*, *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 88 Md.App. 672, 596 A.2d 687 (1991), *cert.den.*, 326 Md. 435, 605 A.2d 137. The Court of Special Appeals reviewed punitive damages awards and the *Haslip* due process factors (88 Md.App. at 704- 712).

Alexander stated (88 Md.App. at 714-718), for example, that punitive damages are only to be imposed for "outrageous conduct." The Court further stated (88 Md.App. at 719), as to appellate review of a punitive damages award:

> If faced with a punitive award that was entered upon proper procedure but which nonetheless contravenes due process because it is out of all proportion to both the harm caused and the perniciousness of the conduct, we could not, on the ground of judicial impotence, allow the unconstitutional award to stand.

Remanding a $12.5 million punitive award (which in itself had been greatly reduced by the trial court) in the case before it, the *Alexander* court made reference to the fact that the plaintiff

"failed to present evidence of [the defendant's] net worth and ability to pay." (88 Md.App. at 719).

Moreover, the *Alexander* court, in remanding the punitive damages issue, determined that "[i]t is for the jury to determine the amount of damages" while "the role of the judge is merely to assure that [the jury] is has exceeded the instructions given it or the supervening legal constraints placed on its discretion."

The Court of Special Appeals, in *Fraidin I*, stated it was remanding the punitive damages award *due to* the importance of properly considering a defendant's financial condition. Thus, *additional* evidence of financial condition would be appropriate on remand. Certainly this necessary if the trial evidence as to net worth was wide ranging and disputed.

Yet the Circuit Court at the remand proceeding refused to permit any additional evidence on Petitioners' financial condition, even though it indicated that it was interested in hearing such evidence. The Circuit Court did so even though it also indicated that it needed additional guidance in this area.

This approach by the trial court on remand clearly was contrary to its remand responsibility to assure the entry of a proper punitive damages award complying with due process requirements. It should not be sanctioned.

Maryland and other courts have long recognized the importance of a defendant's financial status in determining punitive damages. See generally, *Sloan v. Edwards*, 61 Md. 89 (1883); *Schloss v. Silverman*, 172 Md. 632, 192 A. 343 (1937); *Carl M. Freeman Associates, Inc. v. Murray*, 18 Md.App. 419, 306 A.2d 548 (1973); *Derby v. Jenkins*, 32 Md.App. 386, 363 A.2d 967 (1976) (as to "financial ability of the defendant to withstand a verdict of punitive damages"), and *Hamilton v. Ford Motor Credit Co.*, 66 Md.App. 46, 502 A.2d 1057 (1986), *cert.den.*, 306 Md. 118, 507 A.2d 631 (stating "pecuniary

circumstances of the defendant are proper to be considered").

Therefore, at any trial or hearing to assess punitive damages, the financial condition of a defendant *at the time the damages are to be assessed is pivotal.* It follows that, upon any retrial on punitive damages--or at *any* later proceeding on such damages such as on remand of the issue following appeal--any relevant *changes* in financial condition occurring since the time of the original trial would be relevant and admissible.

This is consistent with the primary purpose of punitive damages: to deter conduct and not as retribution. As a comment to Restatement (Second) of Torts Sec. 908(2) indicates, regarding considerations in assessing punitive damages:

> The wealth of the defendant is also relevant, since the purposes of exemplary damages are to punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person.

In *Adams v. Murakami*, 54 Cal.3d 105, 284 Cal.Rptr. 318, 813 P.2d 1348 (1991) (en banc) (noted by the Court of Special Appeals in *Fraidin I*) involving a medical malpractice action, the court stated in its review of punitive damages that "the most important question" for a punitive damages award is whether the damages "will have deterrent effect--without being excessive." That is, *even if a punitive damage award bears a rational relationship to the conduct* the award still can be so disproportionate to a defendant's ability to pay that it would be excessive *for that reason alone.*

The *Adams* court remarked that "the principle that a punitive damage award must be considered in light of the defendant' financial condition is ancient." The court noted the Magna Carta (1215) prohibited certain civil sanctions

disproportionate to the offense or depriving the wrongdoer with the means of livelihood. The court added, "Absent evidence of a defendant's financial condition, a punitive damages award can financially annihilate him. We see no reason why a modern-day civil defendant should be entitled to less consideration than one was given 800 years ago."

In *Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828 (3d Cir. 1983), the court, applying Virgin Islands law, stated that the wealth of the defendant "should be taken into account in assessing" punitive damages. In *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), reviewing applicable standards for due process, the court stated that "Hereafter, to ensure a punitive damage award is proper, the trial court shall conduct a post-trial review and may consider," among other factors, the "defendant's ability to pay".

In *Welty v. Heggy*, 145 Wisc.2d 828, 429 N.W.2d 546 (1992) the court noted that the "net worth" of a defendant for punitive damages purposes *is generally such net worth as of the trial date*. The *Welty* court reviewed a punitive damages proceeding after remand on that issue. The court noted the original trial was in 1983, the retrial on remand was in 1986, and "the trial court determined [defendant's] net worth *as of that date*." [Emphasis supplied]. As such, the court approved the exclusion, in the proceedings on remand on punitive damages, of the value of a residence "which the defendant no longer owned as of the retrial date."

And in *Wilson v. Dukona Corporation*, 547 So.2d 70 (Ala. 1989), the court approved of a remittitur of punitive damages based on evidence at a post-judgment motion hearing that the punitive damages award was excessive in view of the defendants' financial condition *at the time of that hearing*. The court stated, "by clearly showing at the post-judgment hearing

that the punitive damages awarded were excessive, [the defendants] overcame the presumption of correctness that attached to the jury's verdict."

See also, Devane, M.A., "The Use of Evidence of Wealth in Assessing Punitive Damages in New York: *Rupert v. Sellers*,[2]" 44 Albany L.Rev. 422 (1980), discussing punitive damages and recommending the two-phase approach stated in the *Rupert* case. In that approach, evidence of a defendant's wealth is not admitted unless the jury returns a special verdict stating the plaintiff is entitled to punitive damages. Then, only a statement of the defendant's total net worth is sufficient. Full financial disclosure is not required and *discovery as to defendant's net worth is not permitted until after the return of the special verdict.* (44 Albany L.Rev. at 437).

See also, Annotation, 79 A.L.R.3d 1138, "Admissibility on Defendant's Behalf, As Matter in Mitigation of Punitive Damages, of Evidence as to His Lack of Financial Resources" and Annotation, 87 A.L.R.4th 141, "Punitive Damages: Relationship to Defendant's Wealth as Factor in Determining Propriety of Award." As noted in 87 A.L.R.4th 141, at 159:

> Evidence introduced to establish the wealth of a defendant in a punitive damages case may include not only the defendant's net worth, but also its net before-tax income for the year, or both the year and the year after the incident giving rise to the litigation occurred.

Without question, evidence of a defendant's financial condition as to an award of punitive damages must be concerned with that condition *as of the time* of assessing such damages. Such an approach is not only advisable but is also crucial to a

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[2] 48 App.Div.2d 265, 368 N.Y.S.2d 904 (1975).

punitive damage award that would withstand due process review.

Accordingly, in any later punitive damages proceeding, or any retrial of the punitive damages issue, or any new proceeding on remand following appeal, *any change of circumstances* concerning a defendant's net worth must be considered. Whether the defendant, in the interim, had entered bankruptcy or had won the lottery is extremely relevant.

Therefore, even if the Circuit Court was not required to retry the punitive damage issue--although such a retrial was indicated by the remand directive--the Court was *obligated* at any proceeding on the issue to receive evidence of Petitioner's *current* financial condition, including *changes* in that condition since trial--especially if these changes concerned impecunity. Refusal to consider such evidence--especially when the Court itself indicated it would have preferred to have done so--makes no sense.

The Court of Special Appeals merely concluded, without discussion of the authorities noted here that "it would have been inappropriate for the trial court to have granted its remittitur based upon evidence other than that considered by the jury." There is no merit in, or basis for, such an unsupported conclusion.

By all the authorities indicated, and by the standards of due process, it was inappropriate for the Circuit Court *not* to have done so. The Court of Special Appeals in the face of crucial due process standards as well as of that Court's own remarks that punitive damages are not to place a defendant in bankruptcy, it approved a $1.5 million punitive damages award against a defendant *who was already in bankruptcy*.

Indeed, if Mr. Fraidin had won the lottery the day before the February 25, 1993 remand proceeding, no doubt Respondents would have *insisted* that the Circuit Court receive evidence as to

that circumstance. Thus, Respondents' protestations to the Circuit Court and on appeal that Fraidin's bankruptcy was not relevant do not by themselves dispose of the issue.

Due process surely is implicated when a trial court either sets or validates a punitive damages award while at the same time refusing to consider evidence of the defendant's *current* net worth. This is an issue of continuing significance to punitive damage awards, whether as to later trial-level punitive damages proceedings following a verdict on liability, on a later proceeding following a post-judgment motion, or on remand.

III. PUNITIVE DAMAGES WERE EXCESSIVE

Finally, the $1.5 million punitive damages award itself violated due process standards. Punitive damages are an "extraordinary sanction" to be awarded in egregious cases. They may be imposed only where there is "outrageous conduct." Their purpose is not to reward the plaintiff. Here, the supposed "reprehensible" conduct was attempts by Fraidin to settle a lawsuit without participation of attorneys for the plaintiffs, in which there was a genuine dispute over whether the attorneys already had been discharged. The evidence at trial showed that the Dormans, more than once, reaffirmed their discharge of Weitzman and Braiterman. In the hearing to set aside the settlement, Ms. Dorman testified they were not coerced into it by Fraidin. The settlement was confirmed by that court

The supposed "outrageous" and "egregious" conduct, or its "degree of reprehensibility" must be viewed in this context.

There was no evidence of any past conduct by Fraidin of this sort or of the likelihood of any future such conduct. Further, this act did not result in severe personal injury, death, harm to reputation, or permanent environmental pollution.

The Circuit Court's review of the punitive damages award on remand did not properly consider these factors. The

Court did not even review whether there was sufficient evidence to support the punitive damages award. Such an award was a manifest injustice, which the Circuit Court had a duty to prevent, even after affirmance of the underlying verdict on appeal.

Refusal by the Circuit Court to order a retrial of punitive damages, to admit additional evidence, to examine the background, or to support its decision as to a $1.5 million award, violated due process. Further, the trial court merely reduced the total award by half without any explanation for its action.

This Court, in its prior examination of punitive damages awards and due process, has not reviewed the necessity of consideration by a trial court of changes in the financial condition of a defendant between the time of the original award and the time of any remand proceeding or new proceeding. These are persistent issues in such cases, and the application of due process concerns to these circumstances are deserving of review. Thus, the due process issues regarding punitive damages which prompted the remand in this case, and the treatment of those issues in the remand proceeding, are worthy of the attention of this Court.

CONCLUSION

THEREFORE, Petitioner Jacob Fraidin requests of this Court that it GRANT his Petition for a Writ of Certiorari and that it REVERSE the decision of the Court of Special Appeals of Maryland.

RESPECTFULLY SUBMITTED,

Jacob Fraidin
3406 Fielding Road
Baltimore, Maryland 21208
(410) 484-2520
Pro Se

No. 94-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

JACOB FRAIDIN

Petitioners,

v.

ANDRE R. WEITZMAN, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE
COURT OF SPECIAL APPEALS
OF MARYLAND

APPENDIX TO PETITION

Jacob Fraidin
3406 Fielding Road
Baltimore, Maryland
21208
(410) 484-2520
Pro Se

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 935

September Term, 1993

JACOB FRAIDIN, et al.

V.

ANDRE WEITZMAN, et al.,

Moylan,
Alpert,
Wenner,

JJ.

Per Curiam

Filed: March 29, 1994

In *Fraidin v. Weitzman*, 93 Md. App. 168, 611 A.2d 1046, *cert. denied*, 329 Md. 109 (1992) (*Fraidin I*), we vacated a $3 million award of punitive damages entered by a jury in the Circuit Court for Baltimore City in favor of appellees, Andre Weitzman (Weitzman) and Sheldon Braiterman (Braiterman), and against appellants, Jacob Fraidin and two corporations managed by him, Pacific Mortgage and Investment Group. Ltd. and North American Credit Corporation (hereinafter Fraidin). We remanded *Fraidin I* to the circuit court "for its reconsideration of granting a remittitur, or if rejected, a new trial." *Id.* at 27, Pursuant to our mandate, after holding a hearing, the trial court reduced the jury's award of punitive damages to $1.5 million and Weitzman and Braiterman accepted the remittitur. Undaunted, Fraidin noted this appeal. On appeal, we are asked:

1. Did the Circuit Court's punitive damages hearing and order comply with this Court's remand directive?[1]

2. Did the punitive damages figure as entered by the Circuit Court comply with due process requirements and other punitive damages standards, particularly in view of the alleged conduct supposedly supporting such damages?

3. Did the Circuit Court have authority to conduct the punitive damages proceeding upon remand?

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[1] This issue appears as issue three in appellant's brief. The first two issues addressed in appellant's brief are merely arguments in support of this issue. Nevertheless, we shall address these arguments in our discussion.

Finding no error, we shall affirm the judgment of the circuit court.

BACKGROUND

Fraidin I contains a thorough review of the facts giving rise to this dispute. *See* 93 Md. App. at 176-186. As this is an appeal from the remittitur of punitive damages on remand, we shall provide but a brief factual overview.

In May of 1982, Ray and Margarette Dorman (the Dormans) hired Weitzman and Braiterman, of the firm of Braiterman and Johnson, P.A., to represent them in a dispute with Fraidin. The parties entered into an agreement whereby Weitzman and Braiterman would receive a contingency fee. When Weitzman departed Braiterman and Johnson in April, 1985 and began his own firm, the Dormans accompanied him. The Dormans and Weitzman then entered into a new fee agreement. After a trial in the Circuit Court for Baltimore County, the jury awarded the Dormans substantial compensatory and punitive damages.

After judgment was entered, Weitzman took steps on-behalf of the Dormans to collect the judgment entered in their favor. Settlement discussions developed in November, 1985. Fraidin met with the Dormans on several occasions, without Weitzman being present. After several of these meetings, the Dormans discharged Weitzman and settled with Fraidin for $50,000.

After a motion to set aside the order of satisfaction was denied, Weitzman filed a complaint against Fraidin and the Dormans alleging that, among other things, Fraidin had tortiously interfered with the fee agreement between Weitzman and the Dormans.

We remanded *Fraidin I* because the jury's award of punitive damages was not in proportion to Fraidin's net worth. We said:

> We are not satisfied...that the trial court adequately considered whether the amount of the jury's award offended notions of due process.
>
> In *Alexander [v. Evander*, 88 Md. App. 672, 596 A.2d 687, *cert. den.*, 326 Md. 435 (1991)], we stated, among the principles articulated by the Court of Appeals in various cases, punitive damages "must relate to the degree of culpability exhibited by a particular defendant and *that party's ability to pay*." 88 Md. App. at 716. . . (emphasis added).
>
> . . .
>
> What disturbs us about the award in the case *sub judice* is not the particular amount of the award, but its proportion to appellant's wealth. Evidence regarding appellant's net worth was controverted. Information prepared by Fraidin, for litigation purposes placed his personal wealth at $250,000, and the Corporations' in the red as of June 1990. Fraidin's sworn application to the Western Surety Company, introduced by Braiterman, P.A. and Weitzman, showed Fraidin's net worth (including corporate assets) to be over $3,000,000 as of June 1985. Fraidin did not produce copies of his income tax returns for 1988, 1989, or 1990. The jury was entitled to reach its own conclusions regarding appellants net worth; however, no estimates appear to be higher than in the area of $3,000,000. Thus, the $3,000,000 punitive award was essentially equivalent to the maximum approximation of appellant's net worth. When a punitive damages award consumes a defendant's total wealth, it has ceased to serve the societal goal of

> punishment. A defendant need not be financially destroyed in order to be punished.

Id. at 211-212.

In remanding *Fraidin I*, we explained that "[b]ecause the trial court did not consider [Fraidin's] net worth during its review of the jury's punitive damages award, we shall vacate the award and remand the case to the trial court for its reconsideration of granting a remittitur, or if rejected, a new trial." *Id.* at 217.

APPELLEES' MOTION TO DISMISS

Although it appears that Fraidin has failed to comply with several appellate rules of procedure, we emphasize that "dismissal of an appeal for non-conformity with these rules is... discretionary." *In re Joshua W.*, 94 Md. App. 486, 491, 617 A.2d 1154 (1993). Md. Rule 8-501(1) (1992); Md. Rule 8-503(g) (1992). Accordingly, we decline to exercise our discretion and deny appellees' motion to dismiss.

I.

Fraidin first contends that on remand the trial court did not comport with our instructions. Specifically, Fraidin asserts that our mandate required the trial court, on remand, to consider additional evidence of his current net worth.[2] We see it differently.

In remanding *Fraidin I*, we explicitly directed the trial court to reconsider the motion for remittitur, or if a remittitur was rejected, order a new trial on damages. *Id.* In granting a remittitur that was accepted by Weitzman, the trial court

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[2] Fraidin filed for bankruptcy in August, 1991, after the court had entered judgment against him for $3 million. A stay was subsequently ordered, but was lifted so that these proceedings could continue.

complied with our directions.[3]

It is well established that "[a] trial judge, upon finding a verdict excessive, may order a now trial unless the plaintiff will agree to accept a lesser sum fixed by the court." *Banegura v. Taylor*, 312 Md. 609, 624, 541 A.2d 969 (1988). In considering a remittitur, the trial court need consider only the evidence considered by the jury. The Court of Appeals has made it clear that the practice of remittitur is a matter of law for the court:

> Indeed, it may be said that the practice is as much an incident and corrective of jury trial as the right of a trial court to set aside a verdict on the ground that it is against the evidence, or against the weight of the evidence. (Citation omitted.)

Turner v. Wash. Sanitary Commission, 221 Md. 494, 503, 158 A.2d 125 (1960). In our view, Fraidin misunderstood our mandate in *Fraidin I*. As Fraidin apparently sees it, our mandate required the trial court to base its remittitur upon evidence of Fraidin's current net worth. We point out to Fraidin that if that was what we had intended, our mandate would have said so. The jury's award of punitive damages was based upon evidence considered by the jury at trial. Thus, it would have been inappropriate for the trial court to have granted its remittitur based upon evidence other than that considered by the jury. In short, the trial court complied with our mandate. There was no error.

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[3] Fraidin contends that at the proceedings on remand a motion for remittitur was not before the trial court. This is simply not so. As we have noted, in remanding *Fraidin I*, we, directed the trial court to reconsider granting Fraidin's motion for remittitur, or if rejected, a new trial. *Supra*. Thus, there was no need for Fraidin to refile the motion for remittitur.

II.

Fraidin also contends that the trial court's remittitur of one-half of the jury's award of punitive damages is excessive, and deprived him of due process. We do not agree.

In *Fraidin I*, we reviewed the factors to be considered by trial courts in evaluating whether an award of punitive damages violates due process. *Id.* at 205-206 (citing *Pacific Mutual Life Ins. Co. v. Haslip*, --- U.S. --- 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991); *Alexander v. Evander*, *supra*). After reviewing the jury's award of punitive damages, we determined that the record contained sufficient evidence of actual malice to support the jury's award of punitive damages. *Id.* at 204-205. Nevertheless, we concluded that the award of punitive damages deprived Fraidin of the process he was due because it equalled the most optimistic estimate of Fraidin's net worth. *Id.* at 211.

Fraidin now asserts that the trial court's remittitur of $1.5 million is not proportionate to the degree of his culpability, and points out that most punitive damages awards are far less than this one. In *Fraidin I*, *supra*, 93 Md. App. at 211, we reviewed several cases in which large awards of punitive damages had been upheld by Maryland appellate courts:

> [In *Alexander*,] [we] noted that the largest award, of which we are aware, rendered by a Maryland court was $7,500,000 in *Potomac Electric v. Smith*, 79 Md. App. 591, 558 A.2d 768 (1989) (Utility company permitted a high voltage wire to remain downed in an area frequented by children which subsequently caused the electrocution of a child.). The next highest award allowed to stand was $910,000 against Exxon corporation in *Exxon Corp. v. Yamera*, 69 Md. App. 124, 516 A.2d 1990 (1986) (Action against corporation whose storage tanks leaked gasoline that interfered with landowners' property rights.) We also commented that other than these awards, most have been well under $100,000.

Fraidin I, *supra*, 93 Md. App. at 211 (citing *Alexander*, *supra*, 8 82 Md. App. at 720).

Following this review, we said "[w]hat disturbs us in the case sub judice is not the particular amount of the award, but its proportion to appellant's wealth." *Id.* In other words, we shall not entertain Fraidin's argument that the award was excessive because it is not proportionate to his reprehensible conduct. We made it clear in *Fraidin I* that, although the award was quite high, it violated due process only because it consumed Fraidin's entire net worth.

Thus, we are here concerned only with whether the reduced award of $1.5 million is excessive in proportion to Fraidin's net worth. We have recognized that "the granting or refusal of a remittitur is largely within the discretion of the trial judge." *Alexander*, *supra*, 88 Md. App. at 717. In *Fraidin I*, we reviewed the trial court's denial of Fraidin's motion for remittitur and concluded that the trial court had erred in not instructing the jury to consider an award of punitive damages only in proportion to the evidence before it of Fraidin's net worth. On remand, we expressly directed the trial court to reconsider Fraidin's motion for remittitur on this basis. We know of no formula or standard for equating an award of punitive damages in proportion to a defendant's not worth. In remanding, however, we made it clear to the trial court that an award of punitive damages that placed Fraidin in bankruptcy does not accomplish the goal of punishing and deterring wrongdoers. *Fraidin I*, *supra*, 93 Md. App. at 216.

Although we have found no Maryland case saying so, we think it only logical that the amount of remittitur should be evaluated using an abuse of discretion standard. The trial court here remitted one half of the jury's award of $3 million. Although the award of punitive damages remains substantial, we

emphasize, as we did in *Fraidin I*, that there was evidence before the jury that Fraidin's net worth was varied from $225,000 to in excess of $3 million. Accordingly, the trial court did not abuse its discretion in reducing the award of punitive damages to $1.5 million.

III.

Pursuant to our remand, the trial court held a preliminary hearing on November 20, 1992, concerning the award of punitive damages. At that hearing, appellees represented to the trial court that the stay in bankruptcy had been lifted. In fact, the order lifting the stay in bankruptcy van not filed until December 1, 1992.

As Fraidin sees it, the preliminary hearing held on November 20th violated the automatic stay in bankruptcy, rendering the hearing on remand held on February 25, 1993, invalid. Again, we do not agree.

We recognize that "an order of a State court entered in violation of. . an automatic stay under § 362 of the Bankruptcy code. . . is void *ab initio* and without legal affect." *Home Indemnity v. Killian*, 94 Md. App. 205, 218, 616 A.2d 906, *cert. granted*, 330 Md. 458 (1992). Nonetheless, we remind Fraidin that the hearing of Novemnber 20, 1992 was simply a preliminary hearing. Consequently, we fail to see how Fraidin, or his case in the United States Bankruptcy Court, was in any manner harmed by the November 20th proceeding. The judgment appealed from in the case at hand was entered by the trial court after the hearing on remand held on February 25, 1993. This was well after the automatic stay had been lifted. There was no error.

JUDGMENT AFFIRMED.
COSTS TO BE PAID
BY APPELLANT.

MANDATE
Court of Special Appeals

No. 935, September Term, 1993

Jacob Fraidin, et al.
v.
Andre Weitzman, et al.

JUDGMENT: March 29, 1994: Per Curaim filed.
Judgment affirmed. Costs to be paid by appellant.

April 28, 1994: Mandate issued.

STATEMENT OF COSTS:

In the Circuit Court: for BALTIMORE CITY
86044069B , CL46184

Record	60.00
Stenographer Costs	142.50
* Total *	202.50 *

In the Court of Special Appeals

Filing Record on Appeal (Pacific & North)	50.00
Filing Record on Appeal (Fraidin)	50.00
Printing Brief for Appellant	158.40
Reply Brief	554.40
Portion of Record Extract-Appellant	234.00
* Total *	1046.80 *
Printing Brief for Appellee	2451.60
* Total *	2451.60 *

JACOB FRAIDIN et al.	*	**In the**
v.	*	**Court of Appeals**
ANDRE R. WEITZMAN etal.	*	**of Maryland**
	*	**Petition Docket No. 154, Sept. Term 1994**
	*	**(No. 935, Sept. Term 1993, Court of Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY

Chief Judge

Date: September 14, 1994

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1428

September Term, 1991

Jacob Fraidin, et al

v.

Andre R. Weitzman, et al

Andre R. Weitzman, et al

v.

Lawrence D. Coppel, et al

Wilner, C. J.
Bishop,
Alpert,
JJ.

Opinion by Bishop, J.

Filed: September 4, 1992

INTRODUCTION

In this opinion we dispose of two appeals that have been consolidated. The first appeal, filed by Jacob Fraidin (Fraidin) and his corporations, Pacific Mortgage & Investment Group, Ltd. and North American Credit Corporation (the corporations), is from a judgment entered after a jury awarded compensatory and punitive damages against Fraidin and the Corporations in favor of Sheldon H. Braiterman, P.A. (Braiterman, P.A.) and Andre R. Weitzman (Weitzman), appellees.

The second appeal, filed by Braiterman, P.A. and Weitzman, is from a judgment entered in favor of defendants below, appellees, Melvyn J. Weinstock (Weinstock), his law firm, Weinberger, Weinstock, Sagner, Stevan & Harris, P.A. (Stevan & Harris) and Lawrence D. Coppel (Coppel) and his law firm, Gordon, Feinblatt, Rothman, Hoffberger & Hollander (Gordon, Feinblatt).

As a prerequisite to understanding the issues involved in the case sub judice, it is necessary to relate the background of the underlying case out of which this appeal arose.

On May 24, 1982, Ray Dorman (Dorman) and Margarette Dorman (Mrs. Dorman) (collectively the Dormans) hired Sheldon H. Braiterman (Braiterman), James D. Johnson (Johnson), and Andre R. Weitzman, of Braiterman & Johnson, P.A. to represent them in an action against Fraidin and the Corporations. The Dormans executed a Power of Attorney and Contingent Fee Arrangement (the Contract) that provided they were to pay their attorneys 1/3 "if terminated without suit," 40 percent "if suit is filed but there is no trial," and 50 percent "if suit is tried on all amounts recovered by settlement or verdict." The Contract further provided that the Dormans were to reimburse their attorneys for expenses advanced, including court costs.

On April 1, 1985, Weitzman started his own law firm. The Dormans executed a new Contract, dated April 10, 1985, with the same fee arrangement but appointing only Weitzman as their attorney. Fraidin and the Corporations employed Weinstock, of Stevan & Harris, to represent him in the defense of the Dormans' lawsuit. On September 23, 1985, the jury returned a verdict in favor of the Dormans against Fraidin and the Corporations and awarded the Dormans $366,949.86 in compensatory and punitive damages, plus interest and costs. The present litigation involves the fee the Dormans owed Braiterman, P.A. and Weitzman as a result of the litigation between the Dormans and Fraidin which was settled directly with the Dormans by Fraidin.

Braiterman & Johnson P.A. and Weitzman initiated this suit in the Circuit Court for Baltimore City by filing a Complaint against: the Dormans, Fraidin, the Corporations, Weinstock and Stevan & Harris, Coppel, and Gordon, Feinblatt. Count I alleged that the Dormans breached the terms of the Contract. In the alternative to Count I, Count II alleged that the Dormans were required to pay Braiterman & Johnson P.A. and Weitzman for the reasonable value of their services under the theory of quantum meruit. Count III alleged that the Dormans defrauded Braiterman & Johnson P.A. and Weitzman. Count IV alleged that Fraidin, the Corporations, Weinstock, Stevan & Harris, Coppel, and Gordon, Feinblatt tortiously interfered with the Contract. Count V alleged that all of the defendants--Fraidin, the Corporations, Weinstock, Stevan & Harris, Coppel, Gordon, Feinblatt, and the Dormans--engaged in a civil conspiracy to accomplish the breach of the Contract. Punitive damages were sought under Counts IV and V. The court (Noel, J.) later granted Fraidin's motion for judgment on Count II (quantum meruit). Although it is unclear

from the record what the disposition was of Count III (fraud), the parties have indicated it was dismissed.

Trial initially commenced in January 1990, but ended in a mistrial. After the second trial, commenced on September 18, 1990, the jury returned a verdict for Braiterman, P.A. and Weitzman against the Dormans, Fraidin, and the Corporations; it returned a verdict in favor of defendants Weinstock, Stevan & Harris, Coppel, and Gordon, Feinblatt (collectively Lawyer Defendants). The jury assessed the following damages: Count I (breach of contract)--$12,500 "plus interest" in compensatory damages each to Braiterman, P. A. and Weitzman; Count IV (tortious interference with contract)--$91,737.47 "plus interest" in compensatory damages each to Braiterman, P.A. and Weitzman; Count V (Civil Conspiracy)--the jury determined that the Dormans, Fraidin, and the Corporations, but not the Lawyer Defendants, conspired to interfere with the Contract, but that Braiterman, P.A. and Weitzman did not sustain any damages as a result of the conspiracy. The jury determined punitive damages should be assessed against Fraidin and the Corporations, but not against the Dormans. A second phase of the trial was commenced to determine the amount of punitive damages. The jury assessed punitive damages against Fraidin and the Corporations in favor of Weitzman in the amount of $2,500,000, and in favor of Sheldon Braiterman, P.A, in the amount of $500,000. Although Braiterman & Johnson P.A. is the party named as the plaintiff in the complaint, the verdict sheet indicates punitive damages were assessed in favor of "Plaintiff, Sheldon Braiterman, P.A." Possibly, there was an amendment during trial, but we find no explanation of the discrepancy in the record or the briefs. In this opinion we will refer to Braiterman, P.A.

To say that the trial was exhaustive is an understatement. The trial lasted for 29 days, and the record extract before this

Court consumes over 4,000 pages. The parties disputed much of the evidence. We relate the facts as we have garnered them from the record.

FACTS

Shortly after obtaining judgment for the Dormans in Dorman v. Fraidin, Weitzman began efforts to collect from Fraidin by filing Interrogatories in Aid of Enforcement of Judgment and a Request for Production of Documents in Aid of Execution. As a result, Weitzman obtained Fraidin's application to Atlantic Bonding Company, Inc., filed in the summer of 1985, in which Fraidin, under oath, stated combined personal and corporate assets slightly in excess of $3,000,000. The brief of Braiterman, P.A. and Weitzman refers to another financial statement made by Fraidin to the Western Surety Company showing Fraidin's net worth to be $3,125,000 as of June 30, 1985. Our review of this document and the accompanying trial testimony indicates that the document showed Fraidin's net worth to be $3,158,300 as of June 30, 1985. In November 1985, settlement discussions regarding the judgment in Dorman v. Fraidin developed. These negotiations are central to the allegations of Braiterman, P.A. and Weitzman that the defendants tortiously interfered with the Contract, therefore we recount these negotiations in detail.

On November 1, 1985, Fraidin, without Weinstock, met with Weitzman and Braiterman to discuss settlement. Fraidin testified he offered to settle the underlying action for $100,000 over five years, or $60,000 payable immediately. Fraidin's post-trial motions in the underlying action were denied on November 7, 1985.

On November 12, 1985, Fraidin hired additional counsel from Gordon, Feinblatt to handle the post-judgment proceedings in Dorman v. Fraidin, and to advise him of his options in light

of the judgment, including the possibility of filing bankruptcy. Coppel, a specialist in bankruptcy at Gordon, Feinblatt, was assigned Fraidin's case. Coppel familiarized himself with the case: he met with Fraidin, obtained the pleadings from Weinstock, reviewed the facts, and arranged for his partner, Lawrence S. Greenwald, a specialist in litigation, to prepare an appeal. Coppel testified that Weinstock continued to represent the Corporations even after Fraidin retained Gordon, Feinblatt. Fraidin's understanding was that Gordon, Feinblatt represented him and the Corporations for appeal of the judgment in Dorman v. Fraidin. Nevertheless, correspondence from Coppel to Weinstock indicates that Gordon, Feinblatt represented Fraidin only, and that Weinstock continued to represent the Corporations. On November 14, 1985, Fraidin, accompanied by Weinstock, met with Braiterman and Weitzman to discuss Fraidin's assets. On November 18th or 20th, Weinstock, on behalf of Fraidin, called Weitzman to discuss the possibility of providing security for the appeal with a non-refundable escrow fund in the amount of $20,000 which the Dormans would keep, regardless of the outcome of the appeal.

Eventually, there was direct contact between Fraidin and the Dormans, although the parties disputed who initiated the contact. It was clear, however, that, on November 25, 1985, Dorman telephoned Weinstock's office and left a message for Fraidin with Weinstock's secretary that Dorman: "[j]ust wants his money back and he'll settle." Fraidin testified that Weinstock delivered the message to him either that day or the next, and that Fraidin called Dorman and arranged to meet with him on Thanksgiving Day, November 28, 1985. Dorman's deposition testimony, which was introduced at trial, indicated that Fraidin telephoned Dorman, and that it was only after this call that Dorman telephoned Weinstock's office. Fraidin denied initiating

the contact. Dorman testified at his deposition that he never placed another call to Weinstock's office, and that he never spoke with any of the attorneys there, only with the secretary with whom he left the message. Weinstock testified that, after Dorman's call, he instructed his employees not to transfer Dorman's calls to him, and not to give out Fraidin's telephone number. Dorman testified at his deposition that he never spoke to any attorney about a settlement. Weitzman's testimony confirmed that neither Weinstock, nor any member of his firm, ever contacted the Dormans directly.

Regardless of who initiated the contact, the uncontroverted evidence was that, on either November 25th or 26th, Fraidin and Weinstock discussed whether it was permissible for Fraidin to contact Dorman directly to discuss settlement. Weinstock advised Fraidin he could talk directly to Dorman. On November 26, 1985, Fraidin questioned Coppel about the propriety of Fraidin's negotiating directly with the Dormans. Coppel explained his understanding of the law to Fraidin: that it is permissible for the parties to a lawsuit to settle directly with each other. Coppel testified that, notwithstanding his opinion on the legality of direct settlement between Fraidin and the Dormans, he counseled Fraidin against such a settlement. In his testimony, Fraidin confirmed that Coppel gave him this advice. On November 27, 1985, Dorman informed Weitzman that Fraidin had called Dorman to set up a meeting. Weitzman advised Dorman to meet with Fraidin only if Weitzman were present.

On Thanksgiving Day, Fraidin met with the Dormans at a bar in east Baltimore. Dorman's deposition testimony indicated the following series of events. Fraidin met Dorman, Weitzman, and Johnson at Tom & Olive's bar. Dorman was drinking that night. Fraidin told Dorman he had $20,000 from "his people" out in the car, and he was willing to settle for that. Fraidin did not

show Dorman the "flash money." Dorman responded he would not settle for $20,000, and suggested a figure of $50,000, and a low interest loan of $120,000 he could use to purchase Tom & Olive's bar. Fraidin declined Dorman's offer and insinuated he could have Dorman "bumped off" if he refused to settle. Fraidin also stated that, if Dorman settled, he would not have to pay Weitzman, and that Fraidin would keep the amount of the settlement confidential. The trial testimony differed significantly from Dorman's deposition testimony. Weitzman's version of events follows. Weitzman went to Tom & Olive's bar with Johnson. Johnson went inside, but Weitzman waited outside. Twenty minutes later Johnson emerged from the bar and told Weitzman that Dorman was very drunk, and that Fraidin, the Dormans, and the bar owner were having a meeting upstairs where he was not allowed. Weitzman telephoned into the bar and reached Mrs. Dorman, who told him Fraidin had some loan papers regarding the bar. Weitzman asked to speak to Dorman. Dorman said Fraidin was talking to him about "selling [sic] the case." At this point, Weitzman and Johnson went inside to the meeting. Weitzman glanced at the papers on the table before Fraidin put them away. They looked like loan applications. When Dorman went downstairs, Weitzman told Fraidin he should not be attempting to settle with a drunk, and that Fraidin was asking for another law suit.

The following day, Fraidin told Coppel about the meeting in the bar. According to Weitzman, Coppel objected to Weitzman's having met with Fraidin without Coppel's being present, and Coppel threatened to institute disciplinary action against Weitzman.

The Saturday after Thanksgiving, November 28, 1985, Fraidin met with Dorman and Weitzman at a McDonald's (restaurant).

According to Dorman's deposition testimony, admitted into evidence at trial, Fraidin made it clear at the meeting that he would not deal with Dorman in Weitzman's presence.

A bizarre conversation involving Dorman and Coppel occurred on December 3, 1985. Dorman, apparently a problem drinker, called Weitzman and demanded to speak with Coppel. Weitzman telephoned Coppel and informed him that Dorman wanted to speak to him. According to Coppel's notes, Dorman, who was apparently drunk, told him that: Fraidin had threatened the Dormans' lives; Fraidin tried to bribe Dorman into not paying Weitzman and Braiterman; and Fraidin said that Weinstock had taken $20,000 out of his own bank account for the settlement. Dorman made comments about meeting Fraidin in a bar and asked Coppel to attend the meeting. Coppel did not attend any meeting.

On December 4, 1985, the Dormans sent a letter discharging Weitzman and Braiterman as their attorneys. The letter read, verbatim:

> "To whom it may concern [sic].
> I Ray Dorman & Margarette Dorman.
> On this fourth day of December 1985 do here by Fire and dismiss Aundra Weitzman. and Sheldon Braiterman. from the case which they were handling for us with Jacob Fraidin."

Dorman stated at his deposition that Fraidin dictated the letter to him over the telephone, and that Mrs. Dorman "typed it up." Dorman testified: "Fraidin told me that I had to write a letter discharging Mr. Weitzman before he could settle the case without Mr. Weitzman present or another attorney." Dorman explained that Fraidin told him to make three copies: one for Weitzman, one for his own records, and one that Fraidin would send a cab

down to pick up. Weitzman stated at trial that he never received this letter from the Dormans, and that Weitzman learned of the letter only through a telephone conversation with Weinstock.

On December 5, 1985, Weitzman wrote Coppel a letter advising him that Dorman was suffering from an extreme case of alcoholism. Weitzman cautioned that "a settlement with Mr. Dorman while under the influence of alcohol and its side effects will only create new litigation in place of or in addition to that now pending." Weitzman suggested that Coppel should urge Fraidin to withdraw his efforts to communicate with the Dormans.

On December 6, 1985, Weitzman met with Dorman and obtained a handwritten statement from Dorman disclaiming the December 4th letter to Weitzman and Braiterman, and asserting that the Dormans had not settled the case. Fraidin testified that he met with Weitzman in the parking lot of the Mount Washington Tavern on December 8, 1985, and told Weitzman that he was going to settle with the Dormans the next day. Fraidin maintained that he invited Weitzman to the settlement, and that Weitzman made his own decision not to be present.

On the morning of December 9, 1985, Weitzman called Dorman from a deposition he was attending in Rockville. Dorman was very excited and told Weitzman he was not going to make any deal with Fraidin unless it was for $175,000. While still in Rockville, Weitzman received a call from Coppel. Coppel said there was a signed letter firing Weitzman, and asked Weitzman if he had evidence of his authority to act for the Dormans. Through a paralegal in his office, Weitzman arranged for Coppel to receive a copy of the Dorman's handwritten statement of December 6, 1985,

On the afternoon of December 9, 1985, the Dormans settled with Fraidin for $50,000 cash. The settlement

proceedings were recorded and transcribed, and a Notice of Satisfaction of Judgment was executed by the Dormans and later filed with the court. At settlement, Fraidin had the Dormans reaffirm the discharge of Weitzman and Braiterman as their lawyers by initialing and dating the discharge letter of December 4th. Fraidin also had the Dormans sign a confidentiality agreement in which they agreed not to disclose the amount of the cash settlement to third parties* Neither Weinstock nor Coppel attended the settlement. Coppel's time records show three telephone calls with Fraidin on December 9, 1985, but the conversations were not admitted into evidence as a result of Fraidin's assertion of attorney-client privilege. Mrs. Dorman testified that sometime after settlement she placed a call to Weitzman's house for her husband. She handed the phone to Dorman, and a heated discussion ensued. Mrs. Dorman testified that when Dorman hung up the telephone he said he had offered to pay Weitzman 50 percent of $50,000, but that Weitzman had rejected that as "peanuts." Weitzman denied that the "peanuts" conversation ever occurred.

On December 10, 1985, Weinstock called Braiterman and, with Weitzman on the extension, advised that Fraidin had settled with the Dormans. The following day, Weitzman and Braiterman filed a Motion to Set Aside the Order of Satisfaction. On December 13, 1985, Weitzman wrote two letters, one to the Dormans, and the other to Judge Hinkel, the presiding judge in Dorman v Fraidin. He advised the Dormans that he had filed a motion to set aside the order of satisfaction. He also requested a copy of a statement made by the Dormans, which he learned about from Weinstock and Coppel, in which the Dormans purportedly repudiated testimony they gave at the Dorman v. Fraidin trial. The letter to Judge Hinkel advised the judge that Weinstock and Coppel had copies of a statement by the Dormans

that repudiated their trial testimony, and a transcript of the settlement. On December 18th, Weitzman and Braiterman received a certified letter signed by the Dormans dated December 14, 1985 that stated:

> "We have advised you previously that you have been fired and no longer have the athorety [sic] to repersent [sic] us. We insest [sic] that you dismiss your motion to set aside order of satisfaction and not file any more pleadings on our behalf."

On December 16th, Lawrence Greenwald, of Gordon, Feinblatt, wrote Weitzman to reaffirm Coppel's advice that Weitzman not communicate directly with Fraidin, and to advise him against continuing collection proceedings and making defamatory statements about Fraidin or the Corporations--including furnishing copies of the motion to set aside the order of satisfaction to Fraidin's customers.

A hearing on the motion to set aside the order of satisfaction was held before Judge Hinkel. The Dormans testified that the settlement was voluntary and that they were satisfied with it. Judge Hinkel denied the motion to set aside the order of satisfaction. At the trial in the case sub judice, Weitzman presented evidence, in the form of Dorman's deposition testimony, that Fraidin hired an attorney for the Dormans to appear at the hearing on the motion to set aside the order of satisfaction, and that Fraidin told the Dormans what to say. Dorman testified, at his deposition, that he did not tell the truth in front of Judge Hinkel on December 26, 1986 because of threats Fraidin made against him.

Additional facts are included in our discussion of the issues.

ISSUES PRESENTED

Appellants Fraidin and the Corporations present these issues:

I. TORTIOUS INTERFERENCE

A. May a claim alleging tortious interference with a contractual relationship be based on an unethical and excessive fee agreement?

B. Does Braiterman, P.A. have standing to sue for tortious interference with contract, when Braiterman was not a party to the contract?

II. EVIDENTIARY ISSUES

A. Did the trial court err in admitting evidence from the Dorman v. Fraidin trial?

B. Was Dorman's unsworn statement properly withdrawn from evidence?

III. COMPENSATORY DAMAGES

A. Are compensatory damages restricted to 50 percent of the $50,000 settlement received by Dorman?

B. Should Fraidin and the Corporations receive credit on the judgments against them for $25,000--the amount of the judgment rendered against the Dormans for breach of contract?

IV. PUNITIVE DAMAGES

A. When a tort arises from a contract and there is evidence that the sole motivating factor for the defendants' conduct was the desire to save money rather than the desire to deliberately injure the plaintiff, can a punitive damage award be upheld?

B. Does the punitive damage award against Fraidin and the Corporations comply with due process requirements?

C. When the jury based its punitive damage award on prejudicial and erroneously admitted evidence from a separate trial, must the punitive damage award be vacated?

V. PREJUDGMENT INTEREST

Did the trial court abuse its discretion in awarding prejudgment interest to appellees?

VI. MISTRIAL - RECUSAL

A. Does the bias of the trial judge, which resulted in the judge incarcerating Fraidin, without due process, warrant a mistrial?

B. Did the trial court err when it (a) refused to refer the motion for recusal to another judge and (b) ultimately denied the motion for recusal?

Appellants Braiterman, P.A. and Weitzman present the following issues in their appeal against appellees Weinstock and Stevan & Harris, and Coppel and Gordon, Feinblatt:

VII. Did the trial court err in permitting Coppel to withhold his testimony of some conversations with Fraidin and notes of all conversations with Fraidin concerning the events occurring between the parties to this case on the basis of attorney-client privilege, where Fraidin asserted at trial that he acted in reliance upon the advice of counsel, where portions of those conversations were voluntarily revealed by Fraidin and Coppel, and where the advice of counsel was used in the perpetration of the tort of interference with contract?

VIII. Did the trial court err in instructing the jury with incorrect and contradictory statements of law concerning an attorney's liability for aiding, encouraging, and assisting a client in the commission of the tort of interference with contract and liability for conspiring with his client to commit that tort?

* * *

[NOTE: Extensive discussion by the Court of Special Appeals of other issues, as described by the Court (App. pp. 24-25), omitted from Appendix to this Petition, inasmuch as these issues are not pertinent to this Petition.]

* * *

IV. PUNITIVE DAMAGES

Appellants challenge the constitutionality of the jury's $3,000,000 punitive damage award ($2,500,000 in favor of Weitzman and $500,000 in favor of Braiterman, P.A,).

A. Sufficiency of the Evidence

Appellants contend the evidence was insufficient to show they acted with "actual malice" in injuring Braiterman, P.A. and Weitzman. Actual malice refers to "conduct characterized by evil motive, intent to injure, ill will, or fraud." Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, n. 20 at 460 (1992). See also Schaefer v. Miller, 322 Md. 297, 300 (1991) (Actual malice is "the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff.")

There was evidence before the jury from which it could conclude Fraidin "deliberately and wilfully" interfered with the contract between Braiterman, P.A. and Weitzman and the Dormans and that "the interference was purposely done in order to injure" Braiterman, P.A. and Weitzman. Lake Shore Investors v. Rite Aid Corp., 55 Md. App. 171, 181 (1983), aff'd,, 298 Md. 611 (1984). Fraidin stated, in an east Baltimore bar, that if Dorman settled with Fraidin, Dorman would not have to pay Weitzman, and that Fraidin would keep the amount of the settlement confidential. Fraidin made clear at the meeting that occurred at McDonald's that Fraidin would not deal with the

Dormans in Weitzman's presence. Fraidin dictated to the Dormans the letter firing their counsel, and had them reaffirm the discharge by initialing the firing letter at settlement. Weitzman testified Fraidin threatened to sue him. Fraidin explained to Weitzman his strategy was to sue the lawyers that sued him, because "if he gave lawyers who sued him enough trouble... lawyers would stop bringing cases against him." Weitzman testified he had "a clear notion" it was Fraidin's intention to settle the Dorman's case without his being present at the settlement because Fraidin wanted to assure he did not get paid.

When the facts in the case sub judice are compared with facts that courts have found sufficient to constitute actual malice, it is clear to us that the evidence in the case sub judice was sufficient. For example, Lake Shore involved a dispute between a possible tenant, Rite Aid, and a limited partnership that was developing a shopping center, LSI. After negotiations with Rite Aid deteriorated, LSI entered into a lease with Drug Fair. The evidence showed that a representative of Rite Aid vowed "to fix" the partner at LSI who had attempted to negotiate the lease with Rite Aid. Another representative of Rite Aid threatened litigation unless LSI agreed to build a Rite Aid in the shopping center. Counsel for Rite Aid contacted counsel for Drug Fair and said in an "intimidating" voice that Drug Fair could either yield its lease or be in the same shopping center with Rite Aid. The court concluded these facts were sufficient to support an award of punitive damage.

In McClung-Logan Equip. Co., Inc. v. Thomas, 226 Md. 136 (1961), a seller of tractors wrongfully seized a tractor from a buyer who had lodged several complaints about the tractor's performance. In upholding an award of punitive damages, the court found ample evidence from which a jury could find, "that [the seller] acted wilfully, wantonly, and maliciously in utter

disregard of [the buyer's] rights." 226 Md. at 149. The court explained "[i]t was a reasonable and proper inference that" the seller became "provoked" with the buyer's numerous complaints about the tractor's performance and determined to stop the complaints by seizing the tractor and forcing the buyer to sign a release of the claims it might have against the seller. Id. The court further explained that the evidence was particularly clear in light of the seller's insistence that the buyer release all claims against the seller in order to redeem the tractor. Id.

In the case sub judice, there was evidence that Fraidin required the Dormans to discharge Braiterman, P.A. and Weitzman before he would settle the case. In fact, Fraidin was the author of the letter that discharged the Dorman's attorneys. Because Fraidin could have settled with the Dormans without forcing them to discharge their counsel, it is obvious that Fraidin intended to injure Braiterman, P.A. and Weitzman. The evidence was sufficient to show Fraidin's conduct was characterized by evil motive, intent to injure and ill will. Zenobia, id., supra.

Appellants also contend that even if they acted with actual malice, they were not solely motivated by a desire to harm Braiterman, P.A. and Weitzman, but rather by a desire to save money by settling with the Dormans. Appellants cite Knickerbocker Ice Co. v. Gardiner Dairy Co., 107 Md. 556, 569-70 (1908):

> "[I]f, for example, there was evidence tending to show that the defendant had caused the contract to be broken for the sole purpose, and with the deliberate intention of wrongfully injuring the plaintiff, exemplary damages might be recovered, but when the object was merely to benefit itself, although the plaintiff would be thereby injured, there would be no more reason for allowing such damages than there would be in a suit by one party to a contract against the other for breach of it."

(Emphasis added.) We find no merit in appellants' contention that Fraidin was not motivated by a desire to harm Braiterman, P.A. and Weitzman. The argument that Fraidin settled with the Dormans to save money misses the point. Appellants fail to recognize that Fraidin was not sued merely for settling with the Dormans, but for inducing the Dormans to breach their contract with Braiterman, P.A. and Weitzman by making it a condition of settlement that the attorneys not be paid. As we have pointed out, Fraidin could have settled the case with the Dormans without forcing them to discharge their attorneys. Instead, he required that the Dormans discharge their attorneys and facilitated the discharge by providing the text for the discharge letter. Fraidin made it clear that he would not settle with the Dormans unless they fired their attorneys when he required the Dormans to initial the firing letter at settlement.

B. Due Process

In Pacific Mutual Life Ins. Co. v. Haslip, 111 S.Ct. 1032 (1991), the Supreme Court concluded it was possible for a punitive damage award to violate due process. It considered three aspects of the award in determining whether it passed constitutional muster: 1) standards to guide the jury's and the court's discretion; 2) judicial review of jury verdicts; and 3) the amount of the award. In Alexander v. Evander, 88 Md.App. 672 (1991), cert. denied, ___ Md. ___ (1992), Chief Judge Wilner, writing for this Court, analyzed Maryland law in light of the Supreme Court's opinion in Haslip. After outlining case law generated by the Court of Appeals on the issue of punitive damages, he enumerated standards for evaluating punitive damage awards in Maryland, based on that case law, that conform with the requirements implicit in Haslip. Those standards are as follows:

"[P]unitive damages:

(1) may be imposed only where there is "outrageous conduct," Nast v. Lockett, 312 Md. 343, 349, 539 A.2d 1113 (1988), quoting from Black's Law Dictionary 352 (5th ed. 1979);

(2) may be awarded only upon a showing of "actual malice" on the part of the defendant, i.e., "the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff" or, in certain kinds of cases, subject to further refinement by the Court of Appeals, "implied malice," i.e., "conduct of an extraordinary nature characterized by a wanton or reckless disregard for the rights of others," Schaefer v. Miller, 322 Md. 297, 300, 587 A.2d 491 (1991);

(3) "are to punish the wrongdoer, to teach him not to repeat his wrongful conduct and to deter others from engaging in the same conduct," Wedeman v. City Chevrolet Co, 278 Md. 524, 531, 366 A.2d 7 (1976);

(4) "must relate to the degree of culpability exhibited by a particular defendant and that party's ability to pay." Embrey v. Holly, 293 Md, 128, 142, 442 A.2d 966 (1982);

(5) "represent a civil fine, and as such, should be imposed on an individual basis," Id.; and

> (6) may be awarded only upon proof of actual loss and thus may *not* be awarded unless there is also an award of compensatory damages; Shell Oil Co. v. Parker, 265 Md. 631, 640, 291 A.2d 64 (1972); Rite Aid Corp. v. Lake Shore Inv.,, 298 Md. 611, 626, 471 A.2d 735 (1984)."

Alexander, 88 Md.App. at 715-16 (footnote omitted). Judge Wilner concluded that "[t]aken together . . . [the principles enunciated in the cases] suffice in our view to 'reasonably accommodate [the defendant's] interest in rational decision making and [the State's] interest in meaningful individualized assessment of appropriate deterrence and retribution.'" Id. at 716 (quoting Haslip, 111 S.Ct. at 1044). In Medical Mutual Liability Ins. Society of Maryland v. B. Dixon Evander & Assoc., Inc., ___ Md. App. ___, No. 1752, September Term,, 1991, slip op. at 25, filed July 13, 1992, this court summarized the application of the due process standards set forth in both Haslip and Alexander as follows:

> "that the jury should be carefully instructed as to these standards; that the trial judge should review the verdict, apply the same standards and assure that the size of the award will "accomplish society's goals"; and that the amount of the award should be reviewed for excessiveness."

(citations omitted).

Appellants argue that the punitive damage award does not comport with due process because the trial court gave inadequate and inconsistent jury instructions on actual malice, which is the standard all parties agree applies to this case. On December 17, 1990, the court instructed the jury:

> "In addition to damages compensating the plaintiffs for their actual damages, you may, but are not required to, award punitive damages. In this case you are being called upon to first declare whether or not you find that punitive damages should be awarded to the plaintiffs. If you so find, then you shall be given additional instructions.
>
> In order to determine whether or not punitive damages should be awarded, you must find that the defendants had actual malice toward the plaintiffs as their sole motivation for their actions and that their acts were committed for the principle [sic] purpose and deliberate intention of wrongfully injuring the plaintiffs rather than protecting their own interest. The actual malice must be toward the plaintiffs, not against the Dormans, in order to award punitive damages to the plaintiffs.
>
> * * *
>
> Actual malice exists if the conduct complained of was performed in such a manner and under such circumstances as to show that it was without legal justification or excuse and it also was influenced or motivated by hatred or spite or ill will and was performed for the sole purpose to intentionally and deliberately injure or cause damage or loss to the plaintiffs."

The jury sheet, which the jurors were permitted to take to the jury room asked:

> "Should punitive damages be assessed against the Defendants Fraidin and North American Credit Corp. and Pacific Mortgage and Investment Group?"

Appellants contend the jury verdict sheet was inconsistent with the oral instruction because the jury sheet made no reference to the actual malice requirement. This "inconsistency," appellants argue, "rendered the jury incapable of properly assessing whether punitive damages could be awarded." There is no inconsistency. The verdict sheet need not repeat the oral instructions given to the jury. The jury heard the instructions, and presumably utilized them properly in determining that punitive damages should be assessed against appellants. Because there is no inconsistency, the authority cited by appellants, Rosenkovitz v. United Ry. & Elec. Co. 108 Md. 306, 316-17 (1908), (oral instructions inconsistent with written instructions) is inapplicable.

Appellants also contend that the instructions given during the punitive damage phase of the trial were inconsistent with the previous instructions and were erroneous. Appellants complain the instructions lacked any reference to the fact that punitive damages could not be assessed against appellants unless they acted with actual malice, and unless their sole motivation was to injure Braiterman, P.A. and Weitzman. Following the presentation of evidence in the punitive damages phase of the trial, the court gave the following instructions:

> "Now, your previous verdict was an award to the plaintiffs to compensate them for the actual damages they sustained. You may also award them additional damages known as punitive damages. Punitive damages are awarded to punish a defendant who acted the way he did because of malice or intent to cause injury or damage or loss and also to deter others from acting in a similar fashion. Malice or intent with which you are to concern yourselves must be against the plaintiffs and not the malice or intent, if any, that focused on the Dormans.

> Now, there is no exact rule by which to determine the amount of punitive damages. You may fix such amounts as in the exercise of your sound discretion you find will serve to punish the defendants and deter others from acting in similar ways. The financial conditions of the defendants may be considered in determining the amount of damages. Now, there need not be any ratio relationship between the amount of compensatory damages and the amount of punitive damages you assess, if any. In determining the amount of punitive damages you may consider the degree of malice shown by the evidence to have accompanied or motivated the Defendants' conduct."

Based on the instructions given in the previous phase of the trial, including instructions on malice and motivation, the jury determined that punitive damages should be assessed against appellants. Instructions on the malice and motivation necessary to support an award of punitive damages were pertinent only to the jury's decision of whether to award punitive damages. Because the jury already determined that punitive damages should be assessed against appellants, instructions on the malice and motivation necessary to support an award of punitive damages were irrelevant. The purpose of the punitive damages phase of the trial was to determine the amount of punitive damages. Whether such an award was warranted had already been determined by the jury. Appellants were not entitled to have the instructions on actual malice and motivation re-read to the jury.

Appellants further complain that the post-trial procedures were insufficient because the trial court made no effort to determine whether the punitive damages award comported with due process. As explained in Alexander, "the circuit courts in Maryland have broad discretion to review jury verdicts for

excessiveness." 88 Md. App. at 716. "A trial judge, upon finding a verdict excessive, may order a new trial unless the plaintiff will agree to accept a lesser sum fixed by the court." Banegura v. Taylor, 312 Md. 609, 624 (1988). In determining whether the award is excessive, the trial court essentially applies the same standards the jury did. Alexander, 88 Md. App. at 716. "This discretionary review, tempered by those standards, 'provides an additional check on the jury's. . . discretion[.]'" Id. at 717 (quoting Haslip, 111 S. Ct. at 1045).

Appellants filed a post-trial Motion for Judgment Notwithstanding the verdict or Revision of the Judgment or a New Trial ("post-trial motion"). The court interpreted this motion to include a motion for remittitur. After listening to extensive argument regarding the amount of the punitive damage award, the trial court denied appellants' motion. Appellants complain the trial court made no analysis on the record as to why the punitive damage award should stand.

Even in the wake of Haslip, there is no requirement in Maryland that a trial court state on the record its reasons for interfering or not interfering with a jury verdict. Medical Mutual, slip op. at 31. We have reasoned that

> "[t]he federal rules of civil procedure contain no express requirement that a court specify the grounds upon which it is acting in granting or denying a motion for new trial or remittitur...[t]hus, to require as a matter of constitutional law a procedure like Alabama's...[in Haslip, requiring the trial court to state its reasoning on the record,] in every case would be contrary, not only to practice consistently followed by a number of states (such as Maryland), but also to the well-established federal practice. Moreover, there would seem to be some instances in which it is clear from the record, without any express findings by the trial judge, that a punitive damage award is not excessive."

Id. at 32 (citations omitted) (emphasis added).

We conclude in the case sub judice, that the trial judge undertook an appropriate review of the jury's award. It is clear from the court's comments at the hearing that the court's conclusion not to disturb the jury's verdict was based on its decision that the evidence supported the award. Although the trial court did not explicitly state it found Fraidin acted with actual malice, this finding is implicit from the court's decision and discussions with counsel. We are not satisfied, however, that the trial court adequately considered whether the amount of the jury's award offended notions of due process. Evidence introduced regarding appellants' net worth did not support the amount of the jury's award. We explain.

In Alexander, we stated, among the principles articulated by the Court of Appeals in various cases, punitive damages "must relate to the degree of culpability exhibited by a particular defendant and that party's ability to pay." 88 Md. App. at 716 (quoting Embrey v. Holly, 293 Md. 128, 142 (1982) (emphasis added)). Although eschewing any desire to "engage in a proportionality review of punitive damage awards, 88 Md. App. at 721, in deciding whether the award in Alexander comported with due process, we did compare it with other awards. We noted that the largest award, of which we are aware, rendered by a Maryland court was $7,500,000 in Potomac Electric v. Smith, 79 Md. App. 591 (1989) (Utility company permitted a high voltage wire to remain downed in an area frequented by children which subsequently caused the electrocution of a child.). The next highest award allowed to stand was $910,000 against Exxon Corporation in Exxon Corp. v. Yarema, 69 Md. App. 124 (1986) (Action against corporation whose storage tanks leaked gasoline that interfered with landowners' property rights.). We also

commented that other than these awards, most have been well under $100,000. 88 Md. App. at 720.

What disturbs us about the award in the case sub judice is not the particular amount of the award, but its proportion to appellants' wealth. Evidence regarding appellants' net worth was controverted. Information prepared by Fraidin, for litigation purposes, placed his personal wealth at $250,000, and the Corporations' in the red as of June 1990. Fraidin's sworn application to the Western Surety Company, introduced by Braiterman, P.A. and Weitzman, showed Fraidin's net worth (including corporate assets) to be over $3,000,000, as of June 1985. Fraidin did not produce copies of his income tax returns for 1988, 1989, or 1990. The jury was entitled to reach its own conclusions regarding appellants' net worth; however, no estimates appear to be higher than in the area of $3,000,000. Thus, the $3,000,000 punitive award was essentially equivalent to the maximum approximation of appellants' net worth. When a punitive damage award consumes a defendant's total wealth, it has ceased to serve the societal goal of punishment. A defendant need not be financially destroyed in order to be punished.

In Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991), Judge Neimeyer expressed his concern that a defendant's wealth should not only be a relevant factor in awarding punitive damages, but a limiting factor. In declaring South Carolina's procedure regarding punitive damage awards denied the defendant due process, Judge Neimeyer recognized that South Carolina did not have a requirement that:

> "punitive damages bear any specified relationship to the wealth of the defendant. While the court decisions state that the financial ability of the defendant is a relevant factor for consideration by the jury, it is apparently not limiting, and there is no requirement that the defendant have a means to pay."

Id. at 100. (emphasis added). The court noted that since Haslip was decided, the Supreme Court of South Carolina has adopted new guidelines for the review of punitive awards. One such guideline was "defendant's ability to pay." Id. Applying the new guidelines, the court directed the trial court on remand to instruct the jury that:

> "Any penalty must be limited to punishment and thus may not effect economic bankruptcy. To this end, the ability of the defendant to pay any punitive award entered should be considered."

Id. at 110.

Other courts have characterized the defendant's ability to pay as a limiting factor which must be considered by the jury in the first instance, and the trial court upon its review of the jury's award. In Smith v. Telophase Nat'l Cremation Soc'y. Inc., 471 So. 2d 163 (Fla. Dist. Ct. App. 1985), a jury awarded Smith $1,250,000 in punitive damages (in addition to compensatory damages) after Telophase failed to dispose of decedent's ashes in accordance with specific instructions. Finding the punitive damage award excessive, the trial court ordered a new trial in the event a remittitur was rejected. Id. at 164, The District Court of Appeal of Florida held that the trial court properly found the punitive damage award to be excessive:

> [T]he only evidence in the record as to the assets of (Telophase) show a net worth of approximately $1,000,000.
>
> Accordingly, on the face of the record as we have it, punitive damages in an award of $1,250,000 would clearly bankrupt the corporation. It is error for a punitive damage award to be in an amount which will result in economic castigation or bankruptcy of a defendant.

Id. at 170.

In Adams v. Murakami, 813 P.2d 1348 (Cal. 1991). the Supreme Court of California addressed the excessiveness of a punitive damage award. Although the issue in Adams was whether evidence of the defendant's financial condition is a prerequisite to the award of punitive damages, and if so, who bears the burden of proof, the Court made, in passing, several notable comments. The Court recognized that a punitive damage award "can be so disproportionate to the defendant's ability to pay that the award is excessive *for that reason alone*." Id. at 1351 (emphasis in original). The Court reiterated its explanation in Neal v. Farmers Ins. Exch., 582 P.2d 980 (Cal. 1978), that "the purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy." Id. at 1352. The court acknowledged that "'the absence of evidence of net worth precludes an appellate court from deciding whether an award might, for example, bankrupt the defendant.'" Id. at 1353 (quoting Dumas v. Stocker, 213 Cal. App. 3d 1262, 1269 (Cal. Ct. App. 1989)); see also MGW, Inc. v. Fredricks Deve Corp., 5 Cal. App. 4th 92, 111-12 (Cal. Ct. App. 1992) ("All that is necessary in cases where punitive damages are awarded is some evidence from which a reasonable jury and reviewing courts can conclude the award will deter but not cripple the defendant financially."); Wollersheim v. Church of Scientology, 4 Cal. App. 4th 1074, 1095 (Cal. Ct. App. 1992) (reversing punitive damage award because it constituted 150 percent of defendant's net worth); Gerard v. Ross, 204 Cal. App. 3d 968, 980 (Cal. Ct. App. 1988) ("[j]ury misunderstood the purpose of punitive damages and/or acted out of passion or prejudice" because it awarded a $100,000 punitive damage award against the defendant law firm which had a net worth of $100,000 and an annual not income between $90,000 and $150,000); McDonough v. Jorda, 519 A.2d 874, 879 (N.J. Super.

Ct. App. Div. 1986), cert. denied, 489 U.S. 1065 (1989) ("[A] jury must take into consideration the wealth of the defendants. This is so because the theory behind punitive damages is to punish for the past event and to prevent future offenses, and the degree of punishment resulting from a judgment must be, to some extent, in proportion to the means of the guilty person."); Nelson v. Jacobsen, 669 P.2d 1207, 1219 (Utah 1983) ("[T]he defendant's net worth and income are always relevant in determining the amount of punitive damages that would be appropriate for punishment."); cf. Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989) (Financial position of defendant is not to be considered by the jury in awarding punitive damages but is "a consideration essential to a post-judgment critique of a punitive damages award."). But see Hensley v. Paul Miller Ford, Inc., 508 S.W.2d 759, 764 (Ky. 1974) ("[I]n actions for punitive damages the parties may not present evidence or in anywise advise the jury of the financial conditions of either side of the litigation."); Peisner v. Detroit Free Press, 242 N.W.2d 775, 780 (Mich. Ct. App. 1976) (holding that the financial status of the defendant is immaterial, because the purpose of punitive damages in Michigan is to fully compensate the plaintiff, not punish the defendant).

Appellants argued in their post-trial motion that the amount of the punitive damage award was excessive because it was "outrageous, and should shock the conscience of the court." In a supplemental statement of points and authorities, the corporate appellants asserted that the "pecuniary circumstances of the Defendant are to be considered" and in this case, the jury "acted arbitrarily and granted punitive damages which will consume the Defendants' net worth." At the post-trial motion hearing, the following colloquy ensued:

Mr. Steele: That award is way out of kilter with the conduct to be deterred and the actual amount of compensatory damages awarded on that. I would also say that when you add in the evidence on net worth Mr. Hettleman has advised me that the net worth of Mr. Hettleman and the two corporations --

The Court: You mean Mr. Fraidin.

Mr. Steele: Sorry. I mean Mr. Fraidin and the two corporations.

The Court: I don't know Mr. Hettleman's net worth.

Mr. Steele: I didn't ask him that, your honor. I shouldn't have said that. He indicated to me that he thought the evidence before the jury was something in the area of 3 to 3.3 million dollars insofar as the two corporations and Mr. Fraidin is concerned.

I would submit that based on the conduct to be deterred, that is the interference with the fee agreement and the conduct that relates to that issue and to the net worth of the individual and the two corporate entities, that it is an excessive award because it in effect is the whole shooting match.

The Court: I tried a case involving one of the major asbestos insulation companies and as to one plaintiff the jury verdict was one million dollars compensatory -- and I am trying to remember the rest of it -- and 74 million dollars punitive.

Now, does that make it out of line just on those figures?

> Mr. Steele: Well, we don't know what the net worth of the asbestos company was, your honor.
>
> The Court: Suppose the jury heard evidence that the net worth of the asbestos company was around 75 million dollars.
>
> Mr. Steele: I think it would be excessive and I think the courts would find that.
>
> The Court: Okay.

Notwithstanding the foregoing arguments, the trial court denied appellants' post-trial motion.

Therefore, in accord with this court's decisions in Medical Mutual and Alexander, and the guidance provided by the Florida and California courts, we hold that although punitive damages are appropriate in the case sub judice, the jury did not properly consider appellants' wealth in making its punitive damage award. Upon its review of the amount of the award, the trial court did not "assure that the size of the award [would] 'accomplish society's goals,' Medical Mutual, slip op. at 25, and disregarded the disastrous consequences the award would have on appellants' future existence. Had the trial court considered appellants' net worth, it would have required a remittitur, or ordered a new trial on the amount of punitive damages. Consequently, the punitive damage award does not comport with due process because the award "fails to serve its proper purpose" and exceeds "an amount that will accomplish society's goals of punishment and deterrence," Alexander, 88 Md. App. at 717, quoting in part from Haslip, 111 S.Ct. at 1045.

Under these circumstances, we are faced with three possible courses of action:

> "(i) assume an authority implicit from Haslip to modify the award ourselves and reduce it to what we regard as the proper amount, either directly or by ordering a new trial as to punitive damages in lieu of a remission by ...[Braiterman, P.A. and Weitzman]
>
> (2) vacate the award and remand it for reconsideration by the trial judge in the exercise of his authority to require a further remittitur; or
>
> (3) vacate the award and direct a new trial on that issue."

Alexander, 88 Md. App. at 721. We will not choose the first option absent clear direction from the Court of Appeals if other options exist. Id. at 722. Because the trial court did not consider appellants' net worth during its review of the jury's punitive damage award, we shall vacate the award and remand the case to the trial court for its reconsideration of granting a remittitur, or if rejected, a new trial.

Appellants did not raise as an issue the adequacy of the jury instructions regarding the consideration of appellants' wealth. In order to guide the trial court in the event it orders a new trial, we shall briefly address what must be included in the trial court's jury instructions in light of our holding. See Rule 8-131(a).

When it came time to instruct the jury as to how they were to arrive at an amount of punitive damages, the trial court explained:

> Now there is no exact rule by which to determine the amount of punitive damages. You may fix such amounts as in the exercise of your sound discretion you find will serve to punish the defendants and deter others from acting in similar ways. The financial conditions of the defendants may be considered in determining the amount of damages, Now, there need not be any ratio relationship between the amount of compensatory damages and the amount of punitive damages you assess, if any, In determining the amount of punitive damages you may consider the degree of malice shown by the evidence to have accompanied or motivated the defendants' conduct.

Should a new trial be necessary, the trial court, in addition to the foregoing instructions and any other instructions heretofore required on this issue, shall, at the request of the defendants, include an instruction by which the jury is advised that the amount of the punitive damage award should represent an appropriate punishment to appellants taking into account, as a limiting factor, evidence of their financial status. To this end, the jury may only punish appellants for their conduct, not destroy or bankrupt them. Of course, a defendant requesting this instruction may not object to the introduction of evidence of net worth.

C. Admission of Evidence from Dorman v. Fraidin

Because we have held supra that the "erroneously admitted evidence" was not erroneously admitted, we will not address this issue.

V. PREJUDGMENT INTEREST

Appellants contend that the trial court award erred in awarding Braiterman, P.A. and Weitzman prejudgment interest on the compensatory award entered against appellants for tortious interference with contract because: 1) there was no sum certain on which prejudgment interest could be calculated; 2) the jury's

addition of the words "plus interest" after the amount of the compensatory award was insufficient to satisfy the requirement in Md. Rule 2-604(a) that an award of prejudgment interest be "separately stated in the verdict"; 3) the award was calculated incorrectly at the rate of ten percent. We agree with appellants that the award of prejudgment interest fails to satisfy the requirements of Rule 2-604(a).

"Under Maryland law the general rule is that prejudgment interest should be left to the discretion of the jury, or the trial court when sitting without a jury." Merrick v. Mercantile-Safe Deposit & Trust Co., 855 F.2d 1095, 1106 (4th Cir. 1988) (citing I.W. Berman Properties v. Porter Brothers. Inc., 276 Md. 1, 18-19 (1975)). Rule 2-604(a) provides:

> "Any prejudgment interest award by a jury or by a court sitting without a jury shall be separately stated in the verdict or decision and included in the judgment."

Here, the jury was not instructed that it could award prejudgment interest. When the jury returned its verdict, however, it indicated Braiterman, P.A. and Weitzman were each to receive "91,737.47 plus interest." During the hearing at which judgment was entered, counsel for appellants argued:

> "[I]f there is going to be prejudgment interest, it has to be asked for and it has to be separately stated. It was not separately stated, nor was it separately asked for."

Rule 2-604(a) requires that an award of prejudgment interest be "separately stated in the verdict." We are convinced that, unless a jury is instructed on prejudgment interest, the mere addition of the words "plus interest" after the amount of the compensatory award is insufficient to satisfy the requirement. In Eden v. Amoco Oil, Co., Id., 741 F. Supp. 1192 (D.Md. 1990) Judge Neimeyer explained:

> "Prejudgment interest is an aspect of damage which is awarded to compensate a plaintiff for the loss of use of money. As the Supreme Court observed in West Virginia v. United States, 479 U.S. 305, 310-11 n.2, 107 S.Ct. 702, 710 n. 2, 93 L. Ed. 2d 639 (1987), "[p]rejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress."
>
> Because prejudgment interest is an element of the plaintiff's damages, the decision to include it as part of an award properly lies with the finder of fact.
>
> * * *
>
> The notion that prejudgment interest is discretionary with the fact finder, however, does not authorize a court, once a jury has determined damages, to add to those damages a sum for prejudgment interest. The allowance of prejudgment interest would have been discretionary with the jury had it been presented to the jury for consideration and had Eden requested the Court so to instruct the jury. No such claim was presented to the jury and no such request for instruction was made by Eden. It is not within the province of the Court to add to the verdict that which was within the province of the jury."

741 F. Supp. at 1196-97. (Emphasis added.) Whether to allow prejudgment interest was not presented to the jury sub judice. No instruction was requested. The jury's gratuitous addition of the words "plus interest" is insufficient to satisfy the requirement in Rule 2-604(a) that an award of prejudgment interest be "separately stated in the verdict." Without some instruction an prejudgment interest, we cannot be certain that the jury intended

to award prejudgment interest when it said "plus interest." Absent a clear and separate statement from the jury that the compensatory award should include prejudgment interest, the trial judge erred in awarding it.

* * *

[NOTE: Extensive discussion by the Court of Special Appeals of other issues, as described by the Court (App. pp. 24-25), omitted from Appendix to this Petition, inasmuch as these issues are not pertinent to this Petition.]

* * *

IN THE FIRST APPEAL, AWARD OF PUNITIVE DAMAGES VACATED AND CASE REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; JUDGMENT FOR PREJUDGMENT INTEREST REVERSED; IN ALL OTHER RESPECTS, JUDGMENTS IN FAVOR OF BRAITERMAN, P.A. AND WEITZMAN AFFIRMED. COSTS TO BE PAID 80% BY APPELLANTS AND 20% BY APPELLEES. IN THE SECOND APPEAL, JUDGMENTS AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

MANDATE
Court of Special Appeals

No. 1428, September Term, 1991

Jacob Fraidin, et al.
v.
Andre R. Weitzman et al.

Andre R. Weitzman, et al.
v.
Lawrence D. Coppel, et al.

JUDGMENT: September 4, 1992: Opinion by Bishop, J.
In the first appeal, award of punitive damages vacated and case remanded for further proceedings consistent with this opinion; judgment for prejudgment interest reversed; in all other respects, judgments in favor of Braiterman, P.A. and Weitzman affirmed. Costs to be paid 80% by appellants and 20% by appellees. In the second appeal, judgments affirmed. Costs to be paid by appellants.

October 5, 1992: Mandate issued.

STATEMENT OF COSTS:

In the Circuit Court for Baltimore City
86044969, CL46184

Record	50.00
Stenographer Costs	13039.50
* Total *	13089.50 *

As to Jacob Fraidin et al v. Andre R. Weitzman et al:

Filing Record on Appeal	50.00
Brief of Appellants (Fraidin Appellants)	262.80
Joint Record Extract (Fraidin Apppellants)	16254.00
Reply Brief (Fraidin Appellants)	72.00
* Total *	16638.80

Brief of Appellees (Weitzman and Braiterman, P.A.)	295.20
* Total *	295.20 *

As to Andre R. Weitzman et al. v. Lawrence D. Coppel et al:

Filing Record on Appeal	50.00
Brief of Appellants (Weitzman and Braiterman P.A.)	169.20
Reply Brief (Weitzman and Braiterman, P.A.)	46.80
* Total *	266.00 *

Brief of Appellees (Coppel Gordon and Feinblatt)	176.40
Brief of Appellees (Weinstock, Weinberger and Weinstock)	205.20
* Total *	381.60 *

JACOB FRAIDIN et al.	*	In the
v.	*	Court of Appeals
ANDRE R. WEITZMAN etal.	*	of Maryland
	*	Petition Docket No. 496, Sept. Term 1992
	*	(No. 1428, Sept. Term 1991, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, and the answer filed thereto in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY

Chief Judge

Date: January 14, 1993

IN THE CIRCUIT COURT FOR BALTIMORE CITY

ANDRE WEITZMAN, ET AL,

PLAINTIFFS

V. NO. 86044069/CL46184

JACOB FRAIDIN, ET AL,

DEFENDANTS

REPORTER'S OFFICIAL TRANSCRIPT OF PROCEEDINGS

BALTIMORE, MARYLAND
FEBRUARY 25, 1993

BEFORE:

THE HONORABLE THOMAS E. NOEL, JUDGE

APPEARANCES:

PATRICK A. O'DOHERTY, ESQUIRE,
ANDRE WEITZMAN, ESQUIRE, ON BEHALF
OF THE PLAINTIFFS

JACOB FRAIDIN, PRO SE

REPORTED BY:

LESLIE ELISE GROSS,
OFFICIAL COURT REPORTER

PROCEEDINGS

THE COURT: LET THE RECORD REFLECT WE ARE HERE IN THE MATTER OF ANDRE WEITZMAN, ET AL, VERSUS JACOB FRAIDIN, ET AL, AND THIS IS CASE NUMBER 86044069 CIVIL LAW NUMBER 46184.

COUNSEL, WOULD YOU IDENTIFY YOURSELVES FOR THE RECORD, PLEASE AND YOUR RESPECTIVE CLIENT?

MR. O'DOHERTY: PATRICK O'DOHERTY FOR THE PLAINTIFFS.

MR. WEITZMAN: I HAVE BEEN IN PROPER PERSON ON ALL OF THE POST-JUDGMENT PROCEEDINGS, AS THIS GOES DIRECTLY TO THE MERITS, I WOULD JUST LIKE TO HAVE THIS REFERRED BACK TO MR. O'DOHERTY TO ADDRESS EVERYTHING THAT GOES TO THE MERITS OF THE CASE.

THE COURT: VERY WELL.

MR. WEITZMAN: MY NAME IS ANDRE WEITZMAN.

THANK YOU.

MR. FRAIDIN: JACOB FRAIDIN, IN PROPER PERSON, FOR THE DEFENDANT.

THE COURT: AND MR. O'DOHERTY IS, IN FACT, REPRESENTING BRAITERMAN AND JOHNSON, P.A., AS WELL AS ANDRE WEITZMAN IN THIS MATTER.

THE RECORD SHOULD REFLECT THAT ON JANUARY 27, 1991, A JURY IN THIS COURT RENDERED VERDICTS IN THE AMOUNT OF TWO MILLION, FIVE HUNDRED THOUSAND DOLLARS AS PUNITIVE DAMAGES IN FAVOR OF ANDRE WEITZMAN, AND A VERDICT OF FIVE HUNDRED THOUSAND DOLLARS IN FAVOR OF SHELDON BRAITERMAN, P.A..

THE CASE WAS THEN APPEALED TO THE COURT OF SPECIAL APPEALS, AND IN A REPORTED OPINION, THE COURT ESSENTIALLY AFFIRMED THE ENTIRE PROCEEDING WITH THE EXCEPTION OF THE PUNITIVE DAMAGE AMOUNT.

WHAT THE COURT DETERMINED WAS THAT THE AMOUNT OF PUNITIVE DAMAGES AGAINST MR. FRAIDIN --- AND IT SHOULD BE NOTED THAT A SPECIAL VERDICT SHEET WAS SUBMITTED TO THE JURY, AND THE JURY DETERMINED THAT PUNITIVE DAMAGES SHOULD NOT BE ASSESSED AGAINST THE DEFENDANTS RAY AND MARGUERITE DORMAN, BUT PUNITIVE DAMAGES SHOULD BE ASSESSED -- THE PUNITIVE DAMAGES SHOULD BE ASSESSED AGAINST JACOB FRAIDIN AND NORTH AMERICAN CREDIT CORPORATION AND PACIFIC MORTGAGE GROUP, AND THIS VERDICT WAS ENTERED, AS I INDICATED, BY WAY OF A SPECIAL VERDICT SHEET, ON DECEMBER THE 18, 1990.

THE COURT OF SPECIAL APPEALS DETERMINED THAT DURING THE TRIAL, THE TOTAL VALUE OF MR. FRAIDIN'S ESTATE WAS IN THE NEIGHBORHOOD OF THREE MILLION DOLLARS, AND THAT THE PUNITIVE DAMAGE VERDICT WAS ESSENTIALLY TO THE EXTENT OF MR. FRAIDIN'S TESTIFIED-TO VALUE, THE COURT THEN DETERMINED THAT THAT WOULD BE A VIOLATION OF DUE PROCESS, AND THAT THE PUNITIVE DAMAGES WERE TO BE CONSIDERED AS A PENALTY, BUT NOT FOR THE PURPOSES OF BANKRUPTING AN INDIVIDUAL.

WE THEN HAD A MEETING IN THIS MATTER TO DETERMINE HOW WE SHOULD PROCEED, AND A

QUESTION CAME UP AS TO WHETHER OR NOT IN A -- IN A REMITTITUR HEARING WOULD ADDITIONAL EVIDENCE BE PROPER REGARDING THE DEFENDANT'S WEALTH, OR IS THE COURT ESSENTIALLY BOUND BY THE EVIDENCE THAT WAS ADDUCED IN TRIAL ON THIS PARTICULAR ISSUE.

I ASKED COUNSEL TO BRIEF THAT PARTICULAR ISSUE, MR. WEITZMAN DID IN FACT, SUBMIT A BRIEF DETAILING HIS POSITION UNDER THE SIGNATURE OF HE AND MR. O'DOHERTY DETAILING HIS POSITION CONCERNING THIS ISSUE.

MR. FRAIDIN HAD CERTAIN QUESTIONS, BUT NEGLECTED TO SUBMIT A BRIEF, AND WITH THAT, COUNSEL, I AM WILLING TO ENTERTAIN ANY COMMENTS YOU MAY HAVE BEFORE WE ACTUALLY PROCEED ON THE MERITS OF THIS MATTER.

MR. FRAIDIN?

MR. FRAIDIN: MAY I BE HEARD FIRST OR SHOULD THE PLAINTIFFS?

THE COURT: IF YOU HAVE COMMENTS, MR.FRAIDIN, I'D LIKE TO HEAR THEM.

MR. FRAIDIN: FIRST, YOUR HONOR, WITH ALL DUE RESPECT TO THE COURT, I BELIEVE THE COURT OF SPECIAL APPEALS, OTHER THAN JUST REMANDING, REVERSED ALL INTERESTS ON THE JUDGMENT AS PART OF THEIR DECISION.

ALSO, YOUR HONOR, WITH ALL DUE RESPECT, I BELIEVE THAT THE COURT OF SPECIAL APPEALS, IN THEIR OPINION, STARTING ON PAGE 44, BASICALLY SAID THAT THERE WAS CONTROVERTED EVIDENCE AS TO WHAT THE NET WORTH OF THE DEFENDANTS WERE.

STATEMENTS WERE SUBMITTED BY MR. FRAIDIN SHOWING A NET WORTH OF TWO HUNDRED AND FIFTY THOUSAND DOLLARS, AND ALSO STATEMENTS WERE ENTERED INTO EVIDENCE BY THE PLAINTIFFS IN THE CASE REVERTING BACK TO THE 1985, '86, ERA SHOWING -- ONE FINANCIAL STATEMENT SHOWING A NET WORTH OF APPROXIMATELY THREE HUNDRED AND SIXTY-THREE THOUSAND, AND THEN TWO FINANCIAL, FOR LACK OF BETTER TERMS, STATEMENTS THAT WERE PRESENTED TO WESTERN SURETY AND TO ATLANTIC BONDING SHOWING A DISPUTED AMOUNT OF THREE MILLION OR HOWEVER THE COURT ARTICULATED IT.

I DON'T BELIEVE THE COURT SAID THAT THE JURY HAD MADE A DECISION IN THEIR DELIBERATION THAT THE THREE MILLION DOLLAR STATEMENT WAS ACCURATE. THEY JUST SAID THAT THE JURY DID WHAT THEY DID.

TODAY, I WOULD ATTEMPT TO ASK YOUR HONOR TO HEAR CERTAIN TESTIMONY PRESENTED BY ME AND PRESENTED ALSO BY THE FEDERAL BANK EXAMINER WHO WAS APPOINTED IN THIS CASE TO MAKE DETERMINATIONS AS TO WHETHER THE NET WORTHS OF JACOB FRAIDIN WERE AS STATED IN STATEMENTS PRESENTED TO BONDING COMPANIES IN 1985, OR IN ACCORDANCE WITH FINANCIAL STATEMENTS AND FEDERAL DISCLOSURES MADE UNDER THE PENALTIES OF PERJURY TO THE FEDERAL BANKRUPTCY COURT.

IF YOUR HONOR, IN HIS DISCRETION, CHOOSES NOT TO LET THIS ADDITIONAL INFORMATION COME BEFORE THE BENCH, I WOULD ALSO POINT OUT THAT

IN A PUNITIVE DAMAGE AWARD, IF A CASE, TO GIVE AN EXAMPLE, WOULD START IN 1970 AND THE NET WORTH OF THE DEFENDANTS BE A HUNDRED THOUSAND DOLLARS, AT THE CONCLUSION OF THAT CASE, FOR WHATEVER THE DELAY PURPOSES WOULD BE, IF IT CONCLUDED IN 1980 AND THEN THE DEFENDANTS, DUE TO A WINDFALL PROFIT OR A LOTTERY WIN, HAD INCREASED THEIR NET WORTH FROM ONE HUNDRED THOUSAND TO FIVE MILLION, THE JURY HEARING THIS PUNITIVE DAMAGE ASPECT OF THE CASE WOULD NOT BE CONSIDERING THE HUNDRED THOUSAND DOLLAR NET WORTH OF 1970, BUT THEY WOULD BE CONSIDERING THE NOW NET WORTH OF THE DEFENDANTS IN 1980, FIVE MILLION DOLLARS, AND OBVIOUSLY, THE CONVERSE WOULD WORK ALSO.

IF A NET WORTH, ALLEGEDLY, WAS, AS THE PLAINTIFFS WOULD HAVE THIS COURT BELIEVE, THREE MILLION DOLLARS IN 1985 INSTEAD OF THREE HUNDRED AND SIXTY-THREE THOUSAND, THIS CASE TAKING PLACE IN 1980, THE NET WORTH OF JACOB FRAIDIN AT THAT JUNCTURE WOULD BE THE GUIDING FACTS, THE WAY I READ THE OPINION OF THE C.S.A.

I WOULD ALSO POINT OUT TO YOUR HONOR, AND I HOPE NOT TO BE PRESUMPTUOUS OF ME, I'M SURE YOUR HONOR HAS READ THE OPINION. WE ATTEMPTED AT VARIOUS JUNCTURES TO HAVE INDEPENDENT AUDITORS APPOINTED TO FERRET OUT THE TRUTH OF WHAT JACOB FRAIDIN'S NET WORTH WAS.

AT A HEARING, I BELIEVE BEFORE YOUR HONOR IN MAY OF 1991, MY PRIOR ATTORNEY, NEVETT

STEELE, WHO, PRIOR TO GOING INTO PRIVATE PRACTICE, WAS A FEDERAL PROSECUTOR, HAD RECOMMENDED THE FIRM OF TORTOWITZ AND PENSIC, HIGHLY RESPECTED IRS CRIMINAL INVESTIGATORS, AUDITORS AND EXAMINERS.

OBVIOUSLY, THEY WERE GOING TO PUT ME UNDER THE MICROSCOPE, AND COUNSEL HAD ADVISED ME OF THAT BEFORE HE PRESENTED THESE PEOPLE TO THE COURT. I SAID GO FORWARD WITH IT.

THE ONLY CREDITOR THAT OBJECTED TO THE APPOINTMENT OF THESE PEOPLE WERE THE PLAINTIFFS, ANDRE WEITZMAN AND SHELDON BRAITERMAN.

WHY? WHY WOULD SOMEBODY WHO HAD BEEN MAKING THESE ALLEGATIONS AGAINST THE DEFENDANT ALL THROUGH THE TRIAL, THAT HE WAS HIDING ASSETS, THAT HE WAS CONVERTING MONEY, THAT HE WAS SENDING IT OUT OF THE COUNTRY, THAT HE WAS DOING EVERYTHING IMPROPER, WHY WOULD THEY OBJECT TO AN EXAMINER OF THE QUALIFICATION OF TORTOWITZ AND PENSIC BEING APPOINTED? I BELIEVE EVEN YOUR HONOR HAD SOME QUESTION TO THAT AT THE HEARING HERE.

I THINK IT'S OBVIOUS WHY. BECAUSE AFTER THAT EXAMINATION, IF, IN FACT, WHAT FRAIDIN HAD SAID WAS TRUE AND FORTHRIGHT, ALL OF THE ATTACKS AND THE VICIOUS CREDIBILITY ASSAILING OF FRAIDIN BY WEITZMAN WOULD FALL ON DEAF EARS. HE WOULD THEN BE ABLE TO PRESENT TO THIS COURT DOCUMENTATION BY INDEPENDENT EXAMINERS THAT WHAT HE HAD SAID WAS THE TRUTH.

NOW, AFTER -- AFTER COMING UP WITH SOME MERITLESS REASON WHY TORTOWITZ AND PENSIC SHOULDN'T BE APPOINTED -- I BELIEVE MR. BRAITERMAN SAID THEY WERE CONDUCTING SOME EXAMINATION, SOME CRIMINAL EXAMINATIONS ON SOME OF HIS CLIENTS AND HE FELT THAT THERE WAS A CONFLICT. IT WOULD BE MY CONFLICT IF I WISH TO INVOKE IT, NOT HIS. MR. STEELE AND I BOTH ADVISED THE COURT THAT WE HAVE NO CONFLICT. THEY WERE NOT APPOINTED.

AT SOME TIME SUBSEQUENTLY, BANKRUPTCY WAS FILED BY THIS DEFENDANT. OTHER EXAMINERS WERE PRESENTED TO JUDGE TEALE, I BELIEVE HIS NAME -- I BELIEVE THAT'S THE NAME OF THE FEDERAL BANKRUPTCY JUDGE IN WASHINGTON. THEY OBJECTED TO THAT.

THE ONLY CREDITOR THAT OBJECTED WAS WEITZMAN AND BRAITERMAN.

THE JUDGE APPOINTED ON HIS OWN, AFTER DUE EXAMINATION AND PRESENTING IT TO ALL CREDITORS TO SEE IF THERE WAS ANY CONFLICT, MR. ANDREW WOLFSON, A FEDERAL EXAMINER, TO CONDUCT THE SURVEY.

THE JUDGE ALSO GRANTED MR. WEITZMAN A 2004(K) EXAMINATION PURSUANT TO THE ALLEGATIONS THAT HE MADE OF MYSELF AND OF MORRIS HELLMAN WHO WAS TRADING AS BARCLAY NATIONAL MORTGAGE GROUP. THEY ALSO GRANTED TO MR. WEITZMAN ACCESS TO EVERY BANK ACCOUNT, SUBPOENA POWER, ALL CERTIFIED CHECKS, EVERYTHING THAT HE WOULD NEED TO SUBSTANTIATE HIS VEILED ALLEGATIONS AGAINST

THIS DEFENDANT.

AFTER TWO YEARS, MR. WEITZMAN --I FILED BANKRUPTCY IN AUGUST OF '91. EXCUSE ME. APPROXIMATELY TWO YEARS AGO. AFTER TWO YEARS, MR. WEITZMAN HAS NOT BEEN ABLE TO PRODUCE FOR THE BANKRUPTCY COURT OR FOR YOUR HONOR ONE SHRED OF CREDIBLE EVIDENCE TO SUBSTANTIATE HIS ALLEGATIONS THAT I HAD FRAUDULENTLY MISREPRESENTED TO THIS COURT MY NET WORTH.

HE'S TAKEN THE EXAMINATIONS, HE'S GONE AFTER EVERY PRIVATE INVESTOR I HAVE HAD. HE STAYED AWAY FROM THE BANKS AND THE BUILDING AND LOANS BECAUSE THEY WERE CAPABLE OF DEFENDING THEMSELVES. HE'S INTERFERED WITH BUSINESS RELATIONSHIPS OF MINE. HE'S VIRTUALLY ESTOPPED ME FROM MAKING A LIVING, AND I BELIEVE THE REASONS ARE THAT I WOULD NOT BE ABLE TO PROPERLY DEFEND MYSELF. ALBEIT, WHATEVER THE REASONS WERE, IT WAS DONE.

THE FEDERAL EXAMINER, MR. WOLFSON HAS BEEN ON THIS CASE FOR APPROXIMATELY TEN MONTHS. HE'S CONDUCTED WHATEVER EXAMINATION HE FELT WAS NECESSARY. I WOULD LIKE, AT SOME JUNCTURE, TO BE ABLE TO PLACE HIM ON THE STAND FOR MY EXAMINATION OR MY DIRECT TESTIMONY FROM HIM, AND I GUESS FOR ANY CROSS-EXAMINATION.

I HAVE OTHER POINTS THAT I WOULD LIKE TO BRING OUT TO THE COURT. I AM NOT SURE IF THEY WOULD BE AFTER THE PLAINTIFFS ---

THE COURT: WHAT DO THEY DEAL WITH?

MR. FRAIDIN: EXCUSE ME, YOUR HONOR?

THE COURT: WHAT DO THE POINTS ADDRESS?

MR. FRAIDIN: THEY ADDRESS, BASICALLY, MY INTERPRETATION OF THE C.A.'S -- OF THE COURT OF SPECIAL APPEALS' INSTRUCTIONS TO YOUR HONOR.

AND AGAIN, I SAY THIS WITHOUT ANY DISRESPECT. I AM TRYING TO MAKE A RECORD, AND I AM ATTEMPTING TO -- TO READ IT THE WAY I SEE IT. OBVIOUSLY, IT MAY BE -- MAY BE NOT EXACTLY THE WAY YOUR HONOR SEES IT.

IF I MAY PROCEED FORWARD, THE COURT ARTICULATED IN THEIR ASSESSMENT OF PUNITIVE DAMAGES, AND THEY RECITED THREE PUNITIVE DAMAGES AWARDS IN THIS STATE. ONE, I BELIEVE, WAS ---

THE COURT: MR. FRAIDIN, LET'S BACK UP A BIT.

WHAT POINT IS IT THAT YOU ARE TRYING TO MAKE? AND THEN GIVE ME THE AUTHORITY YOU HAVE FOR THE POINT. I'D LIKE TO KNOW THE POINT YOU ARE TRYING TO ADDRESS FIRST.

MR. FRAIDIN: MY POINT IS, YOUR HONOR, IS THAT YOUR HONOR MAY, IN HIS DISCRETION, CONSIDER WHATEVER FINANCIAL INFORMATION THAT HE DEEMS APPROPRIATE IN ORDER TO GRANT ANY REMITTITUR THAT HE DEEMS APPROPRIATE.

THAT HE IS NOT BOUND BY A STATEMENT THAT WAS GIVEN INTO EVIDENCE BY THE PLAINTIFFS THAT WAS ESSENTIALLY WRITTEN IN 1985. THIS CASE OCCURRED IN 1990.

THE DEFENDANT'S NET WORTH MAY BE WAY UP, OR YET IT MAY BE WAY DOWN, OR IT MAY BE WHATEVER IT IS.

THAT A FEDERAL BANKRUPTCY HAS BEEN FILED, THAT PART OF -- PART OF THE DIRECTION OF THE APPELLATE COURT WAS THAT THE PUNISHMENT OR PUNITIVE DAMAGES FOR THE MALICE THAT THEY HAVE -- HAVE RULED ON IS NOT TO DESTROY THE DEFENDANT, AND THEY USED THE VERY TERM, "BANKRUPT HIM."

WELL, I HAVE BEEN BANKRUPT. I HAVE FILED. THOSE SCHEDULES ARE BEFORE THE COURTS. THEY HAVE BEEN ---

THE COURT: MR. FRAIDIN, THAT'S MIXING APPLES AND ORANGES, BUT -- I DON'T WANT TO DEBATE IT.

MR. FRAIDIN, IT HELPS TREMENDOUSLY WHEN YOU GIVE ME THE POINT YOU ARE TRYING TO MAKE AND THEN GIVE ME YOUR AUTHORITY AS OPPOSED TO YOU JUST TALKING ABOUT SOMETHING AND THEN GETTING TO THE POINT.

MR. FRAIDIN: OKAY, YOUR HONOR. EXCUSE ME.

THE POINT I WOULD LIKE TO MAKE IS THAT -- THAT YOUR HONOR SHOULD CONSIDER THE CURRENT NET WORTH OF THE DEFENDANT IN MAKING HIS DETERMINATION IF ANY PUNITIVE DAMAGES SHOULD BE ASSESSED.

I BELIEVE THAT THE AUTHORITY IS THE OPINION OF THE COURT OF SPECIAL APPEALS.THAT BASICALLY SAYS, IN THEIR OPINION, THAT THE PUNISHMENT DAMAGES SHOULD BE COMMENSORATE WITH THE NET WORTH OF THE DEFENDANTS AT THE TIME THAT THE PUNISHMENT DAMAGES ARE AWARDED, NOT AT SOMETIME IN THE FUTURE, OR NOT AT SOMETIME IN THE PAST. NOW THAT'S MY LIBERAL

READING OF THE OPINION.

THE COURT: WHAT PAGE?

MR. FRAIDIN: I BELIEVE ON PAGE 50 OF THE SLIP OPINION, YOUR HONOR, OF WHICH I HAVE MADE A COPY TO PASS UP TO THE COURT IF YOUR HONOR WISHES.

THE COURT: FINE.

MR. FRAIDIN: ON THE PUBLISHED OPINION, IT MAY WELL BE 1069.I WAS USING THE OPINION THAT WAS SENT TO ME WHEN I DID IT.

IT SAYS IN THERE, "CONSEQUENTLY THE PUNITIVE DAMAGE AWARD DOES NOT COMPORT WITH DUE PROCESS, BECAUSE THE AWARD FAILS TO SERVE ITS PROPER PURPOSE AND EXCEEDS AN AMOUNT THAT WILL ACCOMPLISH SOCIETY'S GOALS OF PUNISHMENT AND DETERENT."

IT THEN GIVES THREE POSSIBILITIES THAT THEY COULD ---

"UNDER THESE CIRCUMSTANCES WE ARE FACED WITH THREE POSSIBLE COURSES OF ACTION."

SHOULD I READ THOSE INTO THE RECORD?

THE COURT: GO AHEAD.

MR. FRAIDIN: "ONE, ASSUME AN AUTHORITY IMPLICIT FROM HAYSLIP TO MODIFY THE AWARD OURSELVES AND REDUCE IT TO WHAT WE REGARD AS THE PROPER AMOUNT EITHER DIRECTLY OR BY ORDERING A NEW TRIAL AS TO PUNITIVE DAMAGES IN LIEU OF A REMISSION BY BRAITERMAN, P.A. AND WEITZMAN."

I DON'T BELIEVE AT THIS JUNCTURE THAT THEY HAVE GIVEN A REMISSION,

"TWO, VACATE THE AWARD AND REMAND IT

FOR RECONSIDERATION BY THE TRIAL JUDGE IN THE EXERCISE OF HIS AUTHORITY TO REQUIRE A FURTHER REMITTITUR.

"OR THREE, VACATE THE AWARD AND DIRECT A NEW TRIAL ON THAT ISSUE."

THEY CITE ALEXANDER AT 721 MARYLAND 88, I BELIEVE THEY ARE SPEAKING TO THIS CASE NOW: "WE WILL NOT CHOOSE THE FIRST OPTION--"

THE COURT: SLOW DOWN.

MR. FRAIDIN: "--ABSENT CLEAR DIRECTION FROM THE COURT OF APPEALS IF OTHER OPTIONS EXIST." I.D. AT 722.

"BECAUSE THE TRIAL COURT DID NOT CONSIDER APPELLANT'S NET WORTH DURING ITS REVIEW OF THE JURY'S PUNITIVE DAMAGE AWARD WE SHALL VACATE THE AWARD AND REMAND THE CASE TO THE TRIAL COURT FOR ITS CONSIDERATION OF GRANTING A REMITTITUR OR, IF REJECTED, A NEW TRIAL."

AND THEN IT GOES ON TO GIVE CERTAIN GUIDELINES TO YOUR HONOR SHOULD A NEW TRIAL BE GRANTED.

ON PAGE 52, "SHOULD A NEW TRIAL BE NECESSARY, THE TRIAL COURT, IN ADDITION TO THE FOREGOING INSTRUCTIONS AND ANY OTHER INSTRUCTIONS HERETOFORE REQUIRED ON THIS ISSUE SHALL, AT THE REQUEST OF THE DEFENDANTS, INCLUDE AN INSTRUCTION BY WHICH THE JURY IS ADVISED THAT THE AMOUNT OF THE PUNITIVE DAMAGE AWARD SHOULD REPRESENT AN APPROPRIATE PUNISHMENT TO APPELLANTS, TAKING INTO ACCOUNT, AS A LIMITING FACTOR, EVIDENCE OF

THEIR FINANCIAL STATUS."

MY LIBERAL READING OF THAT MEANS THAT THEIR FINANCIAL STATUS AT THIS TIME, NOT AT A TIME IN THE FUTURE OR AT A TIME EIGHT OR NINE YEARS AGO ALLEGEDLY.

"TO THIS END, THE JURY MAY ONLY" -- AND THIS IS UNDERLINED," -- PUNISH APPELLANTS FOR THEIR CONDUCT, NOT DESTROY OR BANKRUPT THEM.

"OF COURSE, A DEFENDANT REQUESTING THIS INSTRUCTION MAY NOT OBJECT TO THE INTRODUCTION OF EVIDENCE OF NET WORTH."

I WOULD SUBMIT THAT MY AUTHORITY IS THE DIRECTION OF THE COURT OF SPECIAL APPEALS. THEY DO CITE IN THERE THAT ABSENT CERTAIN DIRECTION FROM THE COURT OF APPEALS -- MAYBE THAT DIRECTION HAS OCCURRED SINCE CERTAIN PUNITIVE DAMAGE AWARDS HAVE BEEN VACATED IN THIS CASE. I AM NOT SURE IF IT'S OCCURRED YET OR NOT OR IF IT IS RETROACTIVE TO THIS CASE.

I BELIEVE WHAT THE COURT HAS SAID IS THAT IT IS WITHIN YOUR HONORIS DISCRETION, AND I WOULD RESPECTFULLY REQUEST THAT AN INDEPENDENT FEDERAL EXAMINER BE PERMITTED TO GIVE HIS TESTIMONY AS TO WHAT HE HAS UNCOVERED AS TO THE NET WORTH AND THE STATEMENTS CONCERNING JACOB FRAIDIN, AND I WILL REST AT THIS TIME.

THE COURT: MR. O'DOHERTY?

MR. O'DOHERTY: MAY IT PLEASE THE COURT, I -- I WOULD ASSUME THAT YOUR HONOR -- YOU REFERRED TO THE MEMORANDUM OF LAW PREPARED BY MR. WEITZMAN AND SENT IN UNDER OUR JOINT

SIGNATURES, AND I ASSUME YOU READ THAT OVER, SO I WOULD BEGIN BY SAYING JUST ESSENTIALLY THAT -- AND WE HAVE GIVEN A COPY OF THIS TO MR. FRAIDIN, THAT ABSENT ANY --- ANY -- WELL, I THINK THIS IS THE LAW OF THE CASE, AND THAT THE ISSUE IS NOT AS MR. FRAIDIN NOW SAYS IT WOULD BE, BUT IT'S THE EVIDENCE THAT WAS BEFORE THE JURY AT THE TIME IT MADE ITS AWARD.

NOW -- AND CONSEQUENTLY, IT'S OUR VIEW, AS WE URGED HERE, THAT NO NEW EVIDENCE COULD BE INTRODUCED IN THESE PROCEEDINGS WHEN THE COURT IS CONSIDERING A MOTION FOR REMITTITUR BASED UPON THE EVIDENCE THAT WAS PRODUCED BEFORE THE JURY THAT AWARDED THE DAMAGES.

I WOULD SPEAK TO, IF IT'S REALLY NECESSARY, THE OTHER STATEMENTS MADE BY MR. FRAIDIN, BUT ESSENTIALLY, JUST BRIEFLY, IT WOULD SERVE IN OUR -- IN OUR JUDGMENT, EVEN IF WE WERE TO PUT ASIDE OR IF YOUR HONOR WAS TO DECIDE THAT THE CASES THAT WE'VE CITED ARE NOT THE LAW OF THIS CASE, THAT IT REALLY IS MEANINGLESS TO HEAR ANY EVIDENCE FROM MR. FRAIDIN'S WITNESSES IN THIS CASE BECAUSE OF MR. FRAIDIN'S POST-VERDICT CONDUCT, AND WHAT WE HAVE ALL LEARNED SINCE THEN WITH REGARD TO MONEYS THAT HE HAD AT THAT TIME AND DIDN'T REPORT TO ---

THE COURT: PLEASE ELABORATE.

MR. O'DOHERTY: PARDON?

THE COURT: PLEASE ELABORATE.

MR. O'DOHERTY: THE COURT'S ORDER OF JULY 17, 1981 HAD -- '91, I'M SORRY, HAD GRANTED ANCILLARY RELIEF IN AID OF EXECUTION AND AN

INJUNCTION IN AID OF EXECUTION AFTER A HEARING WITH REGARD TO MR. FRAIDIN, AND WHAT WAS DONE THERE --- WHAT WE SAW WAS POST-VERDICT HE HAD MADE ARRANGEMENTS TO TRANSFER ASSETS IN BARCLAY'S BANK TO FREEPORT THE BAHAMAS.

THAT, NUMBER TWO, A CASHIER'S CHECK FROM THE SECOND NATIONAL BANK OF MARYLAND HAD BEEN ATTACHED IN THE SUM OF FIFTY-TWO THOUSAND, ONE HUNDRED AND FIFTY DOLLARS, PAYABLE TO FRAIDIN DATED DECEMBER 21, 1991, AND THAT THAT HAD BEEN DEPOSITED IN THE MELON BANK EAST IN PHILADELPHIA, AND WE ALSO ATTACHED A COPY OF A CASHIER'S CHECK FROM THE SECOND NATIONAL BANK IN THE SUM OF FORTY-SIX THOUSAND, FOUR HUNDRED TWENTY-THREE DOLLARS, PAYABLE TO JACOB FRAIDIN DATED DECEMBER 21, 1990 AND DEPOSITED IN THE CITIZEN'S BANK OF MARYLAND.

WE ATTACHED THERETO OUR MOTION UPON WHICH THE ANCILLARY RELIEF WAS GRANTED, ANSWERS TO INTERROGATORIES IN AID OF EXECUTION BY THE CITIZEN'S BANK IDENTIFYING AN ACCOUNT NUMBER TITLED A UNIFORM GIFT TO MINORS. MR. FRAIDIN WAS THE TRUSTEE FOR MICHAEL FRAIDIN, AND AGAIN, SIMILARLY, ONE FOR BRIAN FRAIDIN, AND JACOB FRAIDIN AS TRUSTEES FOR LAURA FRAIDIN AND MICHAEL FRAIDIN.

THEN WE ALSO ATTACHED A COPY -- AND AS -- FOR THE RECORD, THOSE FOLKS ARE OVER TWENTY-ONE AND WERE OVER TWENTY-ONE AT THE TIME OF THESE TRANSFERS, AND THEN THERE WAS ALSO ATTACHED AN EXHIBIT DATED MARCH 15, 1990 FROM

THE ESTATE OF CORRINE FRAIDIN TO JACOB FRAIDIN THE SUM OF A HUNDRED THOUSAND DOLLARS WHICH HE DEPOSITED IN THE SECOND NATIONAL BANK.

THERE IS PLAINTIFFS' EXHIBIT 6, A CHECK FOR SEPTEMBER 5, 1990 FROM THE ESTATE OF CORRINE FRAIDIN TO JACOB FRAIDIN IN THE SUM OF A HUNDRED THOUSAND DOLLARS DEPOSITED IN LOYOLA FEDERAL SAVINGS.

THERE WAS A CHECK NUMBER 7 DATED NOVEMBER 2, 1990 FROM THE ESTATE OF CORRINE FRAIDIN TO JACOB FRAIDIN IN THE SUM OF SEVENTY-ONE THOUSAND ZERO SEVENTY-FIVE, TWENTY-TWO DEPOSITED IN MARYLAND NATIONAL BANK, AND ON AND ON, YOUR HONOR. THERE ARE PAGES OF IT.

I THINK FOR THE RECORD AT THIS TIME I WOULD OFFER HERE IN EVIDENCE A -- THE COPY OF THE ORDER OF -- FOR -- GRANTING ANCILLARY RELIEF WHICH SETS FORTH ALL OF THESE TRANSFERS OF MONEY AND MONEYS THAT WERE ACCUMULATED BY MR. FRAIDIN AFTER HE HAD GIVEN TESTIMONY TO THIS JURY THAT HE HAD A NEGATIVE NET WORTH.

IN ADDITION TO THAT, WHEN HE IS TALKING HERE ABOUT HIS BANKRUPTCY FILINGS, AND IF I MIGHT JUST POINT OUT WITH REGARD TO THAT ISSUE, THAT ALTHOUGH HE TESTIFIED IN THIS COURT THAT HE HAD A NEGATIVE NET WORTH, WHEN HE WENT INTO BANKRUPTCY, HE LISTED ASSETS OF 1.2 MILLION DOLLARS. HE DID NOT DISCLOSE MORTGAGES THAT HE HAD AND SOME OF WHICH WERE TRANSFERRED TO HIS PARTNER IN BARCLAY, AND -- AND THERE WAS JUST A MULTITUDE OF -- NOT A MULTITUDE, BUT THERE WERE MANY FACTS THAT SET FORTH WHAT HE

DID THAT REALLY CONSTITUTED A FRAUD ON THE JURY, AND YOUR HONOR HEARD ALL OF THAT OCCUR IN HIS CASE.

BUT WHAT WE HAVE IS THAT WHEN -- THE ONLY STATEMENT THAT FRAIDIN NEVER DID GIVE WHEN IT WAS NOT FOR THE PURPOSE OF LITIGATION WHERE HIS INTEREST WAS TO MINIMIZE WHAT HE HAD WAS THAT STATEMENT THAT HE GAVE TO WESTERN SURETY SHOWING HIS ASSETS OF THREE MILLION A HUNDRED TWENTY-FIVE THOUSAND -- EXCUSE ME, ROUGHLY THREE MILLION -- I THINK IT WAS THREE MILLION A HUNDRED TWENTY-FIVE THOUSAND DOLLARS IN THAT STATEMENT TO WESTERN SECURITY.

SO AS -- AS THE -- MR. FRAIDIN HAS CITED WHAT THE COURT OF SPECIAL APPEALS HAS HAD TO SAY IN ITS OPINION, BUT REALLY, WHAT -- WHAT IT SAYS IS THAT IT MAKES A -- I HAVE A COPY OF IT HERE, YOUR HONOR, BUT THE LEFT-HAND SIDE OF IT IS NOT READABLE IN SOME -- I THINK YOU CAN READ IT, BUT MAY I JUST SUPPLY A COPY OF THAT, BECAUSE THESE REFERENCES THAT MR. FRAIDIN HAS MADE AS TO THE SLIP OPINION AND WE HAVE GIVEN HIM A COPY OF THE -- OF THIS DOCUMENT THAT WE JUST PHOTOCOPIED, AND I THINK YOU CAN READILY SEE THE COMPARISON I BELIEVE WAS ON PAGE 1070, 1070 OF THE ---

THE COURT: IT'S 1063.

MR. O'DOHERTY: 1063? OKAY.

NOW, YOUR HONOR, JUST -- I DID MAKE A LIST HERE AND -- THAT I AM TRYING TO LOCATE --- I THINK THAT WHAT THE COURT OF SPECIAL APPEALS HAS

SAID, IN ESSENCE, IS REPORTED AT PAGE -- FOR INSTANCE, AT 1063, THAT THE -- THAT IT DECIDED THAT THERE WAS A SUFFICIENCY OF EVIDENCE OF MALICE, EVIL MOTIVE WITH THE INTENT TO INJURE AND THERE WAS ILL-WILL AND FRAUD, AND I THINK THE EVIDENCE WHEN YOUR HONOR IS CONSIDERING WHAT TYPE OF A REMITTITUR WOULD BE PROPER IN THIS CASE, WE WOULD ASK THAT ON THAT ISSUE THAT YOU WOULD CONSIDER HIS DELIBERATE AND WILFUL CONDUCT, FOR INSTANCE, IN NOT -- THAT IN INSTRUCTING THE DORMANS NOT TO PAY WEITZMAN THAT HE WOULDN'T DEAL WITH THE DORMANS WITH WEITZMAN PRESENT, THAT THE EVIDENCE IN THE CASE WAS THAT HE WOULD SUE LAWYERS THAT SUED HIM JUST IN ORDER TO GIVE THE LAWYERS TROUBLE, AND THAT HE REQUIRED THE DORMANS TO FIRE WEITZMAN AND BRAITERMAN BEFORE HE WOULD SETTLE THE CASE WITH THEM AT ALL.

THE COURT OF SPECIAL APPEALS AT 1065 SET FORTH THE STANDARDS TO BE CONSIDERED BY YOUR HONOR IN CONSIDERING REMITTITUR, AND THOSE WERE OUTLINED AS OUTRAGEOUS CONDUCT AND ACTUAL MALICE, THE PURPOSE OF WHICH WAS TO PUNISH THE WRONGDOER AND TEACH HIM NOT TO REPEAT WHAT HE HAD DONE IN THE PAST AND TO DETER OTHERS FROM SIMILAR CONDUCT.

THE COURT ALSO NOTED THAT THE AWARD MUST RELATE TO THE CULPABILITY EXHIBITED BY THE DEFENDANT AND THE PARTY'S ABILITY TO PAY. ANOTHER ISSUE WOULD BE THE CIVIL FINE AND THE ACTUAL LOSS.

THE COURT STATED THAT THE RESPONSIBILITY

OF THIS COURT WAS TO REVIEW THE VERDICT, APPLY THE SAME STANDARDS AND ASSUME THAT THE SIZE OF THE AWARD WILL ACCOMPLISH SOCIETY'S GOALS, AND THAT THE AMOUNT OF THE AWARD SHOULD BE REVIEWED FOR EXCESSIVENESS.

THEY WENT ON TO COMMENT AT 1066 THAT THERE WAS NO ISSUE WITH REGARD -- THAT THOSE FACTORS REALLY WERE -- SOME OF THOSE FACTORS WERE PUT BEFORE THE JURY ON THE INSTRUCTIONS, AND NOTED THAT THE TRIAL COURT UNDERTOOK AN APPROPRIATE REVIEW WITH REGARD TO THE INSTRUCTIONS AND -- THE REQUESTED INSTRUCTIONS AND THE INSTRUCTIONS GIVEN TO THE JURY, AND THAT THE COURT CONCLUDED THAT IN THIS INSTANCE, UNDER THE EVIDENCE, THAT YOU HAD TO CONSIDER THE CULPABILITY AND MR. FRAIDIN'S ABILITY TO PAY, AND -- AND THE COURT DID AT 1068, NOTE THE CONCLUSIONS OF THE JURY, AND CERTAINLY IT HELD THAT THEY -- THAT THE EVIDENCE, ESPECIALLY THE EVIDENCE GIVEN WITH REGARD TO HIS NET WORTH OF THREE -- IN EXCESS OF THREE MILLION DOLLARS TO WESTERN SURETY WAS EVIDENCE THAT THE -- THAT THE JURY SHOULD CONSIDER.

THE SIZE OR THE PROPORTIONALITY THE OF THE PUNITIVE DAMAGES AS OPPOSED TO THE COMPENSATORY DAMAGES, AS YOU KNOW, YOUR HONOR, HAS BEEN A SUBJECT OF DISCUSSION IN A NUMBER OF CASES SINCE HAYSLIP, BUT ACTUALLY THE LAW OF MARYLAND AT THIS POINT IS THAT -- THAT THERE -- THERE DOES NOT HAVE TO BE -- I AM TALKING ABOUT THE COURT OF APPEALS, THAT THEY

HAVE YET TO REALLY CHANGE THE LAW THAT WAS EXPOUNDED BEFORE THAT THERE NEED NOT BE A RELATIONSHIP BETWEEN PUNISHMENT DAMAGES AND THE AMOUNT OF COMPENSATORY DAMAGES, BUT WE FREELY ACKNOWLEDGE THAT THERE IS A LOT OF DISCUSSION ABOUT IT NOW DAYS, AND -- BUT THAT IS -- THAT IS JUST BUT ONE CONSIDERATION THAT THE COURT SHOULD ENTERTAIN IN LIGHT OF WHAT THE COURT OF SPECIAL APPEALS HAS SAID, AND WE WANT TO BRING THE LITIGATION TO AN END, HOPEFULLY, AND WE WOULD SUGGEST TO YOUR HONOR THAT WE ARE PREPARED TO ABIDE BY ANY REASONABLE REMITTITUR, BUT WE THINK, FOR THE RECORD, THAT IT IS ESSENTIAL FOR THE COURT TO INDICATE THAT -- THE MATTERS THAT IT HAS REVIEWED IN ARRIVING AT WHATEVER YOUR HONOR'S JUDGMENT SHOULD BE.

THE COURT: MR. FRAIDIN, ANY FURTHER COMMENT?

MR. FRAIDIN: YES, YOUR HONOR.

FIRST, I WOULD LIKE TO COMMENT ON THE READING OF THE OPINION OF THE COURT OF SPECIAL APPEALS.

I AM SURE YOUR HONOR DOESN'T NEED EITHER MR. O'DOHERTY OR MYSELF TO ARTICULATE WHAT THEY MEANT. IT'S CLEAR, IT'S WRITTEN IN THERE. HE HAS RECITED IN -- IN HIS DISCUSSION WITH THE COURT THE WAY HE READS IT. IT DOESN'T READ THAT WAY.

SECONDLY, HE HAS AGAIN -- WE'RE GOING ALL THE WAY BACK TO THE BEGINNING, HE CONTINUES TO USE THIS BASHING ALLEGATION THAT I HAD MISREPRESENTED TO THIS COURT MY NET WORTH.

THE STATEMENT OF WHICH HE SPEAKS OF WAS PRESENTED TO THIS COURT IN DECEMBER OF 1990. IT RELATES BACK TO JUNE 30, 1990. IT DOES NOT SHOW A NEGATIVE NET WORTH. AND AGAIN, HE HAS STATED IT THE WAY THAT IT SOUNDS GOOD FOR HIS SIDE. IT SHOWS TOTAL ASSETS OF SIX HUNDRED FIFTY-THREE THOUSAND, IT THEN ASSESSES WHAT WOULD HAPPEN TO MY NET WORTH AFTER THE COMPENSATORY DAMAGES WERE PAID, AFTER ALL OF THE OTHER LITIGATION WAS PAID AND HAS LEFT THE FIGURE BLANK FOR THE COURT TO ASSESS THEIR OWN DETERMINATIONS.

IN THIS STATEMENT IT HAS ALWAYS BEEN DISCLOSED THAT I HAVE RECEIVED ASSETS FROM THE ESTATE OF MY DECEASED MOTHER, A HUNDRED THOUSAND HAD BEEN RECEIVED PRIOR TO THIS JUNE 30TH STATEMENT, IT WAS DEPOSITED IN THE SECOND NATIONAL BANK. IT HAD BEEN DISCLOSED TO THE PLAINTIFFS. THAT'S HOW THEY ATTEMPTED TO ATTACH IT. AFTER THE JUNE 30TH STATEMENT, OTHER FUNDS CAME INTO MY POSSESSION. THEY WERE ALL ACCOUNTED FOR.

POSSIBLY MONEY WAS IMPROPERLY DEPOSITED IN A UNIFORM COMMERCIAL -- A UNIFORM GIFT TO MINORS ACT. I AM NOT SURE IF IT WAS OR NOT IMPROPERLY. I BELIEVE I HAVE A RIGHT, WITH MY FUNDS, TO DISTRIBUTE THEM TO MY CHILDREN THE WAY I SEE FIT.

HE'S HAD TWO YEARS TO PROVE THAT. HE'S NEVER GOTTEN ONE SHRED OF EVIDENCE TO SHOW THAT I HAVE -- DID DO ANYTHING WRONG. EVERYTHING WAS DISCLOSED TO THIS COURT.

YOUR HONOR ISSUED CERTAIN ORDERS RELYING ON THE REPRESENTATIONS OF THE PLAINTIFFS. THOSE REPRESENTATIONS WERE COUCHED TO MAKE ME LOOK LIKE A FUGITIVE.

THE BARCLAY TRANSACTION THAT MR. O'DOHERTY TALKS ABOUT, I FAXED TO MR. O'DOHERTY'S OFFICE A LETTER TELLING HIM THAT I INTENDED TO TRANSFER FUNDS TO BARCLAY'S NATIONAL BANK TO PURCHASE A BUSINESS IN THE BAHAMAS. ALBEIT HE MADE A BIG JOKE ABOUT IT IN COURT, FRAIDIN IS GOING TO BUY A RESTAURANT IN THE BAHAMAS.

MR. WEITZMAN WAS DOING EVERYTHING IN HIS POWER TO DESTROY ME, TO MAKE IT IMPOSSIBLE FOR ME TO DEFEND MYSELF. IF I WANTED TO HIDE SOMETHING, I SURELY WOULDN'T HAVE FAXED TO MR. O'DOHERTY'S OFFICE A LETTER TELLING HIM WHAT I WAS GOING TO DO. I DIDN'T DO IT. MR. O'DOHERTY TOOK A TRIP TO THE BAHAMAS TO CHECK ON IT. I MEAN THAT'S WHAT HE TOLD ME. WHETHER HE WENT THERE OR NOT OR WAS JUST MAKING A BIG JOKE ABOUT IT, I DON'T KNOW.

I NEVER SENT ONE CENT OUT OF THIS COUNTRY. I'VE CERTIFIED THAT UNDER OATH. I'VE CERTIFIED IT IN THE FEDERAL BANKRUPTCY COURT.

I HAVE PRESENTED TO THIS COURT EVERY DOLLAR THAT I HAVE. I HAVE GIVEN A LIST OF OVER TWENTY BANKS THAT MONEY WAS DEPOSITED IN, HOW IT WAS DEPOSITED. THERE'S BEEN A PAPER TRAIL OF CERTIFIED CHECKS. EVERYTHING HAS BEEN SUPPLIED TO THE FEDERAL EXAMINER UNDER THE DIRECTIVE OF THE BANKRUPTCY COURT. THEY JUST

KEEP MAKING THESE ALLEGATIONS, KEEP TRYING TO MAKE IT SEEM LIKE THAT FRAIDIN HAS DONE SOMETHING WRONG.

I DON'T THINK THAT'S EVEN A CONSIDERATION, THOUGH YOUR HONOR WILL MAKE THE FINAL DECISION. I BELIEVE THAT THE COURT OF SPECIAL APPEALS HAS SAID YOU HAVE TO CONSIDER HIS NET WORTH, YOU CAN'T DESTROY HIM, IF YOU ARE TO GRANT THE REMITTITUR, YOU HAVE TO GRANT IT COMMENSORATE WITH HIS NET WORTH.

THE COURT OF SPECIAL APPEALS DETERMINED THAT MALICE WAS IN EFFECT. THAT'S AN ISSUE THAT HE DOESN'T HAVE TO GO BACK INTO AGAIN. HE GOES BACK INTO IT AGAIN TO HELP RETRY AND INTIMIDATE.

ALL THE COURT HAS SAID IS PUNATIVES WERE IMPROPER, WE VACATE, JUDGE NOEL, DO WHAT IN YOUR DISCRETION YOU FEEL IS PROPER. IF IT IS NOT ACCEPTED BY THE APPELLANTS OR THE DEFENDANTS, THEN THE CASE WILL CONTINUE ON.

HE'S ADDRESSED EVERYTHING EXCEPT WHY HE DOESN'T WANT TO HEAR FROM THE FEDERAL EXAMINER AGAIN. I MEAN THIS IS AN INDEPENDENT AUDITOR ABOVE REPROACH APPOINTED BY THE FEDERAL BANKRUPTCY COURT. THIS MAN HAS LITERALLY DONE EVERYTHING HE COULD TO DESTROY ME.

THE COURT: WHAT HAPPENED TO THE BANKRUPTCY CASE?

MR. FRAIDIN: EXCUSE ME, YOUR HONOR.

THE COURT: WHAT HAPPENED TO THE BANKRUPTCY CASE?

MR. FRAIDIN: IT IS STILL ACTIVE. MY CHAPTER 11 IS STILL A VIABLE CHAPTER, AND MR. WEITZMAN, ABSENT OF COUNSEL, IS MAKING THESE SAME ALLEGATIONS INTO THAT COURT TRYING TO AVOID CERTAIN REFERENCES AS TO MORTGAGES THAT WERE TAKEN, KNOWING THAT THE DOCUMENTS WERE PRESENTED TO HIM, KNOWING THAT THOSE DOCUMENTS ARE VALID AND EXIST, HE HAS GOTTEN NOWHERE AT THIS POINT. HE HAS NOT WON AN ARGUMENT IN THAT COURT AS TO ANYTHING THAT -- THAT WOULD -- THAT WAS DONE WRONG.

HE HAS ALL MY DOCUMENTS. THEY WON'T RETURN THEM. THE EXAMINERS EVEN ASKED FOR THEM. HE'S HAVING PROBLEMS GETTING THEM BACK.

THOSE DOCUMENTS, ONCE I FILED BANKRUPTCY, SHOULD HAVE BEEN RETURNED SO THAT I CAN COMPLY WITH THE DIRECTIVES OF THE BANKRUPTCY COURT.

THERE IS NOTHING -- NOTHING THAT SUPPORTS WHAT HE'S DONE. HE HAS COLLECTED ONE HUNDRED THOUSAND DOLLARS ON THIS JUDGMENT. HE HAS NOT GIVEN US A CREDIT FOR IT. HE HAS NOT DISMISSED HIS LIEN AFTER THE COURT OF SPECIAL APPEALS SAID YOU HAVE A LIEN OF NINETY-ONE THOUSAND AND HE HAD ALREADY COLLECTED A HUNDRED.

THE COURT ALSO DIRECTED HIM, PURSUANT TO THE OPINION, TO PAY CERTAIN COURT COSTS THAT I WAS FORCED TO ADVANCE. MY COUNSEL AT THAT TIME, MR. STEELE, WROTE HIM, DEMANDING THE PAYMENT OF IT. HE SAYS I AM NOT PAYING IT, JUDGE NOEL IS GOING TO GIVE A REMITTITUR, WE'LL SEE WHAT HAPPENS. THAT'S A CAUSE FOR THE FUTURE,

HE HAS AN OBLIGATION, ESPECIALLY AS AN ATTORNEY, TO DISMISS THE GARNISHMENTS ONCE HE HAS BEEN PAID IN FULL. AT THIS JUNCTURE, HE HAS BEEN PAID IN FULL. I HAVE INCURRED ANOTHER LIABILITY BECAUSE OF HOW HE ACQUIRED THESE FUNDS, BUT HE'S STILL ACQUIRED THEM IN HIS SOLE CAPACITY UNREPRESENTED BY MR. O'DOHERTY.

OBVIOUSLY, IF MR. O'DOHERTY REPRESENTED HIM, MR. O'DOHERTY WOULD HAVE FOLLOWED THE RULES, AND WE HAVE TO LOOK AS TO WHY HE DISMISSED MR. O'DOHERTY AND CONTINUED ON IN PROPER PERSON AND NOW MR. O'DOHERTY IS BACK, AND TOMORROW MAYBE HE WILL BE GONE AGAIN. IT'S JUST GONE BACK AND FORTH FOUR OR FIVE TIMES, YOUR HONOR.

I KNOW WE HAVE ALL HAD PROBLEMS WITH ATTORNEYS IN THIS CASE, SO I'M MAYBE TREADING ON SOME THIN WATER, BUT I THINK THAT THE RULES CLEARLY SAY THAT WHEN YOU COLLECT A HUNDRED THOUSAND DOLLARS ON AN OUTSTANDING JUDGEMENT THAT THE COURT OF SPECIAL APPEALS SAYS IS NINETY-ONE THOUSAND DOLLARS, YOU'D BETTER DARN-SIGHTED REPORT IT TO THE COURT, RELEASE THE ATTACHMENTS AND RELEASE ALL THE LEVIES AND LIENS THAT YOU HAVE APPLIED TO PROPERTY. NOW HE DOESN'T DO IT, BECAUSE HE THINKS HE HAS A PRIORITY, IF HE KEEPS THOSE LIENS IN PLACE, AGAINST OTHER SECURED CREDITORS.

WELL, HE WILL ANSWER TO THAT IN ANOTHER FORUM, BUT I HAVEN'T HEARD ANYBODY GET UP AND DENY ANYTHING. I HAVEN'T HEARD ANYBODY SAY I DIDN'T GET THE MONEY. I TRIED TO ARTICULATE THIS

AT THE LAST HEARING HERE, BUT I DON'T BELIEVE THAT WAS THE PROPER TIME, BUT COUNSEL KNEW THAT HE HAS THAT MONEY. HE KNEW HE SHOULD HAVE DONE SOMETHING TO ALERT THE COURT. NOTHING WAS DONE.

THE COURT: MR. FRAIDIN, ONCE THAT IS PRESENTED TO ME PROPERLY, IF EVER, THEN IT WILL BE DEALT WITH ACCORDINGLY.

MR. FRAIDIN: THANK YOU, YOUR HONOR.

THE COURT: IT HAS TO BE BEFORE ME FOR ME TO TAKE ACTION.

MR. FRAIDIN: AGAIN, THE -- THE PLAINTIFFS IN THIS CASE PLACE ALL OF THEIR ATTACK ON TWO STATEMENTS GIVEN TO BONDING COMPANIES, NEVER GIVEN TO A COURT OF LAW, NEVER GIVEN TO A BANK TO BORROW MONEY, NEVER GIVEN -- THE STATEMENTS SPEAK FOR THEMSELVES.

THEY -- THEY HAVE BEEN DISECTED BY MR. WOLFSON. HE WOULD LIKE TO ADDRESS THEM, IF THE COURT WOULD HEAR IT.

THEY ALSO NEGLECT TO MENTION THE STATEMENT THAT WAS GIVEN IN THE ORIGINAL DORMAN TRIAL, A FINANCIAL STATEMENT THAT AFTER THE TRIAL WAS OVER, MR. WEITZMAN PROCEEDED TO HAVE A PERJURY INVESTIGATION CONDUCTED BY THE STATE'S ATTORNEY'S OFFICE IN BALTIMORE COUNTY. WHEN THE RESULTS CAME BACK NEGATIVE, HE DEEP-SIXED IT, YOU NEVER HEARD ANYTHING ABOUT IT, BUT IN THE TRIAL HERE WE GOT A LETTER FROM THE STATE'S ATTORNEY SAYING THAT HE HAD FULLY INVESTIGATED THE STATEMENTS, AND I WOULD PRODUCE THAT LETTER

AGAIN, IF YOUR HONOR WISHES TO SEE IT, AND BASICALLY CLEARED ME OF ANY WRONGDOINGS.

I TRIED TO GET THAT INTO EVIDENCE IN THE LOWER CASE, AND FOR WHATEVER THE REASONS, THE COURT FELT THAT IT WOULD BE A COURT EXHIBIT BUT WOULD NOT BE IN EVIDENCE.

I THINK IT -- I THINK IT SHOULD BE FAIRLY CLEAR TO THE COURT THAT IF A CREDITOR HAS A JUDGMENT DEBTOR AND HE CAN'T GET PAID AND HE'S MAKING ALL OF THESE ALLEGATIONS ABOUT HIDING AND TRANSFERRING AND THE DEBTOR WANTS TO PUT EXAMINERS IN TO PUT HIM UNDER THE MICROSCOPE, WHY IN THE WORLD WOULD YOU OBJECT, UNLESS YOU KNEW WHAT THE RESULTS WOULD BE AND THEN YOU KNEW THAT THOSE RESULTS WOULD EFFECTIVELY SKUTTLE ANY ATTEMPT BY YOU TO SHOW THAT FRAIDIN IS A FRAUD, IS NOT CREDIBLE OR ANYTHING ELSE.

HE WAS WAITING FOR THIS DAY. HE HAD POSSIBILITIES OF WHAT THE COURT OF SPECIAL APPEALS WOULD DO. WE ALL HAD INSIGHTS AS TO WHAT THEIR OPINIONS WOULD BE, AND HE WANTED TO BE IN A POSITION TO HAVE ME UNABLE TO DEFEND MYSELF, DISMISS THE APPEAL, SETTLE WITH ME, LET ME PUT YOU INTO A STATE BANKRUPTCY, ALL OF THESE DIFFERENT ALLEGATIONS. WE COULD GO ON FOR HOURS, BOTH OF US. YOUR HONOR HAS HEARD NINE MONTHS OF THIS AGGRAVATION, AND I AM SURE HE DOESN'T WANT TO HEAR ANY MORE.

I WOULD BASICALLY SAY THAT I HAVE A WITNESS HERE THAT I WOULD LIKE TO TAKE THE STAND. I ALSO BELIEVE THAT THE COURT OF SPECIAL

APPEALS' OPINION CAN BE READ BY YOUR HONOR AND YOUR HONOR CAN MAKE HIS OWN DECISION AS TO WHAT IT SAYS.

I READ MR. WEITZMAN'S BRIEF. WITH ALL DUE RESPECT, IT SOUNDED LIKE A BUNCH OF DOUBLE-TALK. IT CITED CASES THAT WEREN'T ON POINT, WENT INTO ALL TYPES OF THEORIES ON WHY A JUDGE WHO HAS THE SOLE DISCRETION OF GRANTING A REMITTITUR SHOULD DO IT THE WAY HE WANTS IT DONE.

OTHER THAN THAT, I COULDN'T SUBMIT A LEGAL BRIEF ON HOW YOUR HONOR SHOULD ADDRESS A REMITTITUR, BECAUSE I BELIEVE THAT'S WITHIN YOUR SOLE DISCRETION. I DON'T BELIEVE THERE IS CASE LAW THAT SAYS YOU MUST DO THIS, YOU MUST DO THAT. I THINK WHAT YOU DO IS, AGAIN, WITH ALL DUE RESPECT, YOU TAKE INTO CONSIDERATION WHAT THE COURT OF APPEALS HAS DONE WITH PUNITIVE DAMAGE AWARDS IN THIS STATE.

IN THEIR OPINION, THEY SAY THAT A HUNDRED THOUSAND DOLLARS -- I WOULD LIKE TO READ THAT INTO THE RECORD TOO, YOUR HONOR.

PAGE 44 OF THE SLIP OPINION, STARTING AT THE TOP, "ALTHOUGH" E-S-C-H-E---

THE COURT: ESCHEWING.

MR. FRAIDIN: "--ESCHEWING ANY DESIRE TO ENGAGE IN A PROPORTIONAL REALITY OF PUNITIVE DAMAGE AWARDS, IN DECIDING WHETHER THE AWARD IN ALEXANDER COMPORTED WITH DUE PROCESS, WE DID COMPARE IT WITH OTHER AWARDS.

"WE NOTED THAT THE LARGEST AWARD OF

WHICH WE ARE AWARE RENDERED BY A MARYLAND COURT WAS SEVEN MILLION, FIVE HUNDRED THOUSAND DOLLARS IN POTOMAC ELECTRIC VS. SMITH 79 MARYLAND APPELLATE 591, 1989.

"UTILITY COMPANY PERMITTED A HIGH VOLTAGE WIRE TO REMAIN DOWN IN AN AREA FREQUENTED BY CHILDREN WHICH SUBSEQUENTLY CAUSED THE ELECTRICUTION OF A CHILD.

"THE NEXT HIGHEST AWARD ALLOWED TO STAND WAS NINE HUNDRED AND TEN THOUSAND AGAINST EXXON CORPORATION," EXXON V. YAREMA 69 MARYLAND APPELLATE 124 1986.

THAT WAS AN ACTION AGAINST THE CORPORATION WHOSE STORAGE TANKS LEAKED GASOLINE THAT INTERFERED WITH LANDOWNER'S PROPERTY RIGHTS.

"WE ALSO COMMENTED THAT OTHER THAN THESE AWARDS, MOST HAVE BEEN WELL UNDER A HUNDRED THOUSAND DOLLARS," 88 MARYLAND APPELLATE AT 720.

"WHAT DISTURBS US ABOUT THE AWARD IN THIS CASE SUB JUDICE IS NOT THE PARTICULAR AMOUNT OF THE AWARD BUT ITS PROPORTION TO APPELLATE'S WEALTH.

"EVIDENCE REGARDING APPELLATE'S NET WORTH WAS CONTROVERTED. INFORMATION PREPARED BY FRAIDIN FOR LITIGATION PURPOSES PLACED HIS PERSONAL WEALTH AT TWO HUNDRED FIFTY THOUSAND, AND THE CORPORATIONS IN THE RED AS OF JUNE, 1990.

"FRAIDIN'S SWORN APPLICATION TO THE WESTERN SURETY COMPANY INTRODUCED BY

BRAITERMAN P.A. AND WEITZMAN SHOWED FRAIDIN'S NET WORTH, INCLUDING CORPORATE ASSETS, TO BE OVER THREE MILLION AS OF JUNE, 1985."

OTHER THAN THAT, I THINK THE COURT HAS BASICALLY LEFT IT UP TO YOU, YOUR HONOR.

THANK YOU.

MR. O'DOHERTY: MAY I JUST SAY ONE THING? I DON'T WANT TO GET BACK INVOLVED IN THAT OTHER BUSINESS, BUT YOUR QUESTION WITH REGARD TO THE STATUS OF THE BANKRUPTCY CASE, IN THAT CASE, THERE ARE TWO ADVERSARIAL PROCEEDINGS RIGHT NOW. THERE HAS BEEN NO HEARING, AND WE'RE TRYING TO GET RECORDS OVER THERE FROM MR. FRAIDIN, BUT OVER THERE, THEIR ADVERSERIAL PROCEEDINGS ARE WITH REGARD TO FRAUDULENT TRANSFERS AS WELL.

MR. FRAIDIN: MR. O'DOHERTY DOES NOT REPRESENT THE APPELLANTS -- THE PLAINTIFFS IN THIS CASE IN THE BANKRUPTCY COURT, AND HIS REPRESENTATIONS ARE NOT CLEAR. MR. WEITZMAN JUST WITHIN, I BELIEVE, THE LAST WEEK FILED ANOTHER ADVERSARY PROCEEDING TRYING TO AVOID CERTAIN PREFERENCES. THAT'S GOING TO FALL ON DEAF EARS ALSO BECAUSE HE'S MISREPRESENTED TO THE BANKRUPTCY COURT FACTS THAT ARE UNDISPUTEABLE.

THE BANKRUPTCY EXAMINER EXAMINED THAT SUIT ALSO, AND I WOULD LIKE TO COMMENT ON IT, IF THE COURT IS INTERESTED. I DON'T KNOW IF IT IS GERMANE TO WHAT IS GOING ON HERE, BUT AGAIN, I HAVEN'T HEARD THEM SAY WHY HE SHOULD NOT TAKE THE STAND.

THE COURT: IS EVERYONE FINISHED?

MR. O'DOHERTY: YES, SIR.

MR. FRAIDIN: YES, SIR,

THE COURT: MR. FRAIDIN HAD MADE A COMMENT WITH RESPECT TO ALLEGING THAT THE PLAINTIFFS IN THIS CASE ARE NOT INTERESTED IN WHAT THE INDEPENDENT BANKRUPTCY INVESTIGATOR WOULD HAVE TO SAY, BECAUSE IT WOULD BE SUPPORTIVE OF HIS POSITION. I DON'T KNOW THAT THAT'S NECESSARILY ACCURATE, BECAUSE MR. FRAIDIN, I BELIEVE THAT THERE IS A BODY OF LAW THAT DOES GOVERN SITUATIONS SUCH AS THIS.

WE HAD A VERY LENGTHY, INVOLVED TRIAL IN THIS CASE, AND I DON'T THINK IT PROPER TO GO BEYOND THE EVIDENCE THAT WAS ADDUCED AT THAT TRIAL. ALL OF THIS -- AND I GUESS YOU GENTLEMEN HAVE BEEN GOING AT IT FOR WELL OVER AN HOUR, CLOSE TO AN HOUR AND A HALF, WAS IN RESPONSE TO A SIMPLE QUESTION OF MINE, AND THAT QUESTION WAS WHETHER OR NOT ADDITIONAL EVIDENCE COULD BE TAKEN AT A REMITTITUR HEARING.

I WANTED AUTHORITY, AND -- BECAUSE I WAS OF THE OPINION THAT ANY DECISION I MADE REGARDING THE REMITTITUR WOULD HAVE TO BE COUCHED IN TERMS OF WHAT OCCURRED DURING THE TRIAL.

I WOULD BE MOST INTERESTED IN HEARING WHAT THE INVESTIGATOR WOULD TESTIFY TO, BUT I DON'T FEEL IT IS PROPER.

ANY CONDUCT OF YOURS, MR. FRAIDIN, WITH RESPECT TO MR. WEITZMAN AND MR. BRAITERMAN IN

THIS CASE AS TO THE ISSUE OF MALICE HAS ALREADY BEEN RESOLVED. THE JURY MADE A FINDING, THE COURT OF SPECIAL APPEALS HAS AFFIRMED IT.

THE JURY ALSO HEARD CONFLICTING CONTROVERTED EVIDENCE REGARDING YOUR NET WORTH.

THE JURY SEEMED TO FEEL THAT THERE WAS -- THAT YOU WERE WORTH SUBSTANTIALLY MORE THAN THE EVIDENCE YOU PRODUCED.

IT IS -- WHEN I CALCULATED THE COMPENSATORY AWARD, I BELIEVE IT CAME OUT TO THE PENNY OF WHAT THE ATTORNEY FEE WOULD HAVE BEEN IN THE UNDERLYING CASE, AND I THINK THE THREE MILLION DOLLAR FIGURE WAS PROBABLY A SAME OR SIMILAR CALCULATION BY THE JURY THAT CAME TO THE AMOUNT OF YOUR TESTIFIED TO WORTH OR ONE BIT OF EVIDENCE THAT DID, IN FACT, COME IN.

SO I AM NOT -- I AM OF THE OPINION, AND I DO FIND THAT IN A REMITTITUR HEARING I AM BOUND BY WHAT OCCURRED IN THE TRIAL, AND I AM NOT PERMITTED TO GO BEYOND THAT, SO THAT IS WHAT I WILL LIMIT MY FINDING TO, THE EVIDENCE THAT WAS ADDUCED DURING THE VERY LENGTHY AND INTERESTING TRIAL THAT WE HAD HERE THAT DID LAST, I GUESS, A TOTAL OF THIRTEEN WEEKS OR SO, CONSIDERING BOTH SETS OF HEARINGS.

NOW, THE QUESTION IS HOW DO WE PROCEED.

THE COURT OF SPECIAL APPEALS, OBVIOUSLY, DIDN'T WANT TO TACKLE THIS AND DETERMINE THE AMOUNT TO BE REMITTED, AND NOBODY, UNDER ANY CIRCUMSTANCES, WANTS TO TRY THIS AGAIN.

SO THE TWO POSSIBILITIES THE COURT OF SPECIAL APPEALS SUGGESTED -- TWO OF THE THREE I KNOW WE'RE NOT GOING TO PROCEED WITH, THE THIRD BEING THE REMITTITUR HEARING.

NOW, IF COUNSEL -- IF MR. FRAIDIN AND MR. O'DOHERTY WOULD LIKE TO MAKE ARGUMENTS COUCHED STRICTLY IN TERMS OF THE EVIDENCE THAT WAS BROUGHT FORTH IN THE LENGTHY TRIAL FOR ME TO CONSIDER FOR THE REMITTITUR, I WILL DO SO.

NOW, DURING THE TRIAL, AS THE COURT HAS POINTED OUT, THE EVIDENCE CONCERNING YOUR NET WORTH WENT ACROSS THE SPECTRUM. AS A MATTER OF FACT, THE TESTIMONY WAS THAT THE CORPORATIONS WERE OPERATING IN THE RED.

NOW, I AM WILLING TO LISTEN TO ARGUMENTS BASED ON THE EVIDENCE THAT WAS, IN FACT, ADDUCED AT TRIAL, OR I CAN MAKE MY RULING HAVING SAT THROUGH ALMOST TWO TRIALS INVOLVING THIS SET OF CIRCUMSTANCES. IT IS YOUR DECISION.

MR. FRAIDIN?

MR. FRAIDIN: I'D LIKE ONE GUIDELINE FROM YOU. IS IT YOUR POSITION THAT A PUNITIVE DAMAGE AWARD SHOULD BE CONSIDERED AND EVALUATED AS TO AN ALLEGED NET WORTH SEVEN YEARS BEFORE THE FACT, OR AT THE TIME THAT THE PUNITIVE DAMAGE TRIAL TAKES PLACE?

THE COURT: MR. FRAIDIN, AS I INDICATED, MY DECISION WILL BE BASED UPON WHAT THE EVIDENCE WAS THAT WAS PRESENTED TO THE JURY.

MR. FRAIDIN: OKAY, THEN I WOULD SAY ONE THING, YOUR HONOR, I DO NOT BELIEVE THAT THE

JURY ARTICULATED AS TO HOW THEY ARRIVED AT THREE MILLION.

THE COURT: AND YOU ARE CORRECT.

MR. FRAIDIN: I BELIEVE THE JURY -- SINCE THEIR VERDICT ON COMPENSATORY WAS TO THE PENNY OF WHAT THE PRIOR JUDGMENT WAS IN THE LOWER COURT, IT WOULD NOT BE A QUANTUM LEAP TO THINK THAT THEY DECIDED THAT THAT JUDGMENT WOULD HAVE BEEN WON OR WHATEVER THEY DECIDED AND GRANTED IT.

MR. O'DOHERTY SAID TO THE JURY GIVE ME THREE MILLION DOLLARS.

THE COURT: I BELIEVE MR. O'DOHERTY ASKED FOR FIVE IN HIS CLOSING ARGUMENT.

MR. FRAIDIN: WELL, I WON'T ARGUE WITH YOUR HONOR. I AM NOT SURE, BUT THE JURY CAME UP WITH WHAT THEY CAME UP WITH, AND I GUESS NO ONE KNOWS HOW THEY CAME UP WITH IT.

I DID NOT INTRODUCE ANY STATEMENTS THAT SHOW A NET WORTH OF THREE MILLION. THEY WERE INTRODUCED BY THE PLAINTIFFS IN THIS CASE, THEY WERE VEHEMENTLY OBJECTED TO. THERE WAS MANY HOURS OF TESTIMONY EXPLAINING THESE, REFUTING THEM, SHOWING ALL OF THE DIFFERENT THINGS. YOUR HONOR SAT THROUGH IT TO, I GUESS, NAUSEATING ALMOST.

MY STATEMENTS THAT WERE INTRODUCED AND THAT ARE IN THIS CASE GO TO 1984, I BELIEVE, THE TRIAL DATE OF THE ORIGINAL DORMAN CASE. IT SHOWS WHAT IT SHOWS. MY STATEMENT OF JUNE, '90 -- JUNE 30, 1990 WAS INTRODUCED BY ME. HE WAS QUESTIONED ON IT EXTENSIVELY. A LIST OF

CREDITORS, OTHER LAW SUITS AND EVERYTHING ELSE IS THERE.

ALL OF THE EVIDENCE IS IN BEFORE THE COURT.

NOW, IF YOUR HONOR IS ASKING FOR US AT THIS JUNCTURE -- OBVIOUSLY, I PRESUME YOU ARE NOT GOING TO GIVE YOUR RULING TODAY WITHOUT, YOU KNOW, READING AND TAKING INTO CONSIDERATION, ASKING FOR US TO BREAK DOWN THINGS AND TRY TO CLARIFY IT, THEY WILL CLARIFY IT TO WHAT THEY WANT TO SHOW AND I WILL CLARIFY IT TO WHAT THE DOCUMENTATION SHOWS.

OTHER THAN THAT, I THINK A KEY QUESTION -- AND AGAIN, YOUR HONOR IS FAR MORE EQUIPT TO DETERMINE WHAT THE COURT OF SPECIAL APPEALS SAYS THAN WHAT I SAY, BUT IT WOULD SEEM TO ME THAT IT WOULD BE IMPOSSIBLE TO COMPORT WITH THEIR DIRECTION IN NOT PUNISHING THE DEFENDANT IN EXCESS OF HIS NET WORTH OR HIS ABILITY TO PAY IF YOU ARE GOING TO USE ANY DATE OTHER THAN THE CURRENT DATE.

WE SURELY COULDN'T GIVE A DAMAGE AWARD COMMENSURATE WITH WHAT MIGHT OCCUR IN FOUR YEARS, BECAUSE THE DEFENDANTS ARE WORKING ON AN INVENTION THAT IF IT IS PERFECTED THEY WILL BE ABLE TO SELL IT TO GENERAL MOTORS AND GET THIRTY MILLION.

THE SAME WOULD BE WE COULD NOT GO ON THE ALLEGED NET WORTH OF A DEFENDANT SEVEN YEARS PRIOR. I THINK THAT SEVEN YEAR DIFFERENCE IS CRITICAL TO THIS CASE. NORMAL CASES INVOLVING PUNITIVE DAMAGES ARE GOVERNED BY

THE NET WORTH AT THE TIME THE JURY CONSIDERS THE PUNITIVE DAMAGES.

THERE IS NO EVIDENCE IN THIS CASE THAT SHOWS THAT FRAIDIN'S NET WORTH IN 1990, OR IS ANYWHERE NEAR WHAT THE PLAINTIFFS WOULD HAVE THE COURT BELIEVE, AND THEY HAVE HAD TWO YEARS IN WHICH TO SUBSTANTIATE IT TO THIS COURT.

I GUARANTEE YOU, YOUR HONOR, IF THEY COULD HAVE PROVED THAT I LIED AND THEY COULD SUBSTANTIATE WHAT THEY DID, YOU'D HEAR A COMPLETELY DIFFERENT ARGUMENT, WE WANT NEW EVIDENCE PRESENTED, WE WANT THE COURT TO HEAR ALL THE NEW EVIDENCE, BECAUSE WE HAVE A BANK THAT FRAIDIN HAS TWO MILLION DOLLARS IN, OR WE HAVE SUBSTANTIATION FROM A FEDERAL EXAMINER THAT FRAIDIN LIED, THAT HERE IS HIS MONEY. YOU WOULDN'T HEAR THE ARGUMENT THAT YOU ARE HEARING TODAY, DON'T LOOK AT ANYTHING ELSE NEW, DON'T CONSIDER ANYTHING ELSE, AND I THINK THE COURT IN THEIR DISCRETION, HAS TO CONSIDER THE CREDIBILITY IN DETERMINING ANY FACTOR.

I AM HERE CUT OPEN. I HAVE BEEN DISECTED, I HAVE BEEN IN BANKRUPTCY FOR TWO YEARS. THE FACTS ARE THERE, AND THAT'S BASICALLY WHAT I WOULD SAY, YOUR HONOR.

THANK YOU.

MR. O'DOHERTY: I SHALL BE BRIEF ON THE POINT, BUT AGAIN, JUST TO REITERATE WHAT MR. FRAIDIN HAS SAID, WHAT THE COURT OF SPECIAL APPEALS HAS SAID IS, QUOTE, WHAT DISTURBS US ABOUT THE AWARD IN THE CASE SUBJUDICE IS NOT

THE PARTICULAR AMOUNT OF THE AWARD, BUT ITS PROPORTION TO THE APPELLANT'S WEALTH.

NOW, WITH REGARD TO THE ISSUES OF WHAT WAS BEFORE THE JURY, I BELIEVE, IF I AM INTERPRETING WHAT YOUR HONOR IS REQUESTING OF US, IS WHAT WAS BEFORE THE JURY WAS THE -- THE -- THE HIGH DEGREE OF MALICE. THERE WAS EVIDENCE OF A HIGH DEGREE OF MALICE, AND THAT THAT MALICE WAS A PERSONAL MALICE AGAINST WEITZMAN AND BRAITERMAN.

AND IN EFFECT, WE HAVE -- I HAVE ALREADY COMMENTED BEFORE WITH REGARD TO SUBORNING OF -- EXCUSE ME, THE FABRICATION OF EVIDENCE THAT THE JURY HEARD WITH REGARD TO WEITZMAN AND FRAIDIN. THEY HEARD THE SUBORNED PERJURY THAT WENT -- OR THE ACCUSATIONS OF SUBORNING PERJURY BEFORE JUDGE HINKEL AND IGNORED IT.

THEY CONSIDERED THE DEFAMATORY STATEMENTS MADE ABOUT -- MOSTLY ABOUT MR. WEITZMAN OF HIM HAVING RUNNERS AND THAT HE WAS A DRUG ADDICT, THAT HE WAS A VIOLENT PERSON, AND HIS -- HIS MALICE AND IN LIGHT OF WHAT HE HAD DONE IN INSISTING ON AN APOLOGY FROM BRAITERMAN TO AVOID -- TO AVOID HIM TAKING ACTIONS AGAINST MR. BRAITERMAN, BUT WHAT WE ARE DEALING WITH HERE, AND WHAT WE ARE ASKING THE JURY TO CONSIDER, IN LIGHT OF THOSE CITATIONS OF AUTHORITY BY THE COURT OF SPECIAL APPEALS CONCERNING WHAT WAS DONE IN, FOR INSTANCE, THE B.G. & E. -- THE POTOMAC EDISON CASE OF SEVEN MILLION, AND ANOTHER CASE OF LEAKING GASOLINE, WHAT THIS CASE INVOLVED IS

MR. FRAIDIN'S INTENTIONAL CONDUCT IN POLLUTING THE ENTIRE JUDICIAL SYSTEM, AND WE HAVE WITNESSED AND THE JURY WITNESSED WHAT HE DID TO ACCOMPLISH THAT RESULT.

THE CASES THAT THE COURT OF APPEALS MENTIONED ARE CASES INVOLVING NEGLIGENCE, AND SINCE ZENOBIA, THE POINT THAT I HAVE MADE ON THESE PUNITIVE DAMAGES CASES -- THE SEVEN MILLION DOLLARS CASE AGAINST POTOMAC EDISON, THE PLAINTIFFS IN THAT CASE COULDN'T GET THE COST OF A FUNERAL WREATH TODAY, BECAUSE THE IMPLIED MALICE STANDARD WAS WIPED OUT BY THE COURT OF APPEALS.

BUT WHAT WE HAVE HERE AND WHAT WE ARE ASKING THIS COURT TO CONSIDER IS THE HIGH DEGREE OF MALICE, AND WHAT MR. FRAIDIN DID AND HOW HE SET UPON THIS MISSION OF CORRUPTING THE ENTIRE JUDICIAL SYSTEM WITH -- WHOSE RESPONSIBILITY IT IS TO LITIGATE ISSUES FAIRLY AND HONESTLY AND JUSTLY BETWEEN PARTIES THAT COME BEFORE THE COURT.

NOW, WITH REGARD TO JUDGE BISHOP'S STATEMENTS IN THAT OPINION ABOUT WE CAN'T BANKRUPT MR. FRAIDIN, YOU KNOW, I HAVE A LOT OF RESPECT FOR JUDGE BISHOP, AND HE CERTAINLY IS A SCHOLAR AND A GENTLEMAN. THE JUDGES THAT WERE WITH HIM WHEN THEY HEARD THIS CASE ON APPEAL ARE ALL FAR MORE EDUCATED THAN I AM, BUT WHEN YOU REALLY LOOK AT THIS ISSUE THAT YOU CAN'T BANKRUPT HIM, BANKRUPT HIM FROM WHAT? THE ISSUE HERE IS TO PUNISH HIM AND TO DETER OTHERS FROM SIMILAR CONDUCT.

WE KNOW HIS BUSINESS, AND WHAT THE COURT HAS REALLY SAID IS THAT HE'S GOT TO HAVE MONEY LEFT TO SUPPLY THE KIND OF BUSINESS THAT HE HAS BEEN ENGAGED IN, WHICH IS TO LOAN MONEY AT THESE OUTRAGEOUS RATES.

MR. FRAIDIN: I AM GOING TO OBJECT.

MR. O'DOHERTY: I WILL STOP ON THAT.

MR. FRAIDIN: THIS IS TOTALLY IMPROPER.

THE COURT: ONE MOMENT.

GENTLEMEN. GENTLEMEN.

THE OBJECTION IS SUSTAINED.

MR. O'DOHERTY: YOUR HONOR, I WOULD JUST SAY IN CONCLUSION THAT -- THAT THE COURT IS CERTAINLY CORRECT THAT WE DON'T WISH TO -- TO RELITIGATE THIS MATTER. WE THINK IT SHOULD BE BROUGHT TO AN END, AND WE, IF YOU ARE LOOKING FOR WHAT WE REALLY FEEL WITH REGARD TO A REMITTITUR, IF I UNDERSTAND, IF THAT'S ONE OF THE QUESTIONS, RELUCTANTLY WE WOULD -- WE WOULD CERTAINLY FEEL THAT IF THE CASE WAS REMITTED TO TWO MILLION DOLLARS, WE WOULD BE SATISFIED WITH THAT.

THE COURT: GENTLEMEN, GIVE ME A MOMENT.

MR. FRAIDIN MAKES A VERY LEGITIMATE POINT WHEN HE RAISES THE ISSUE OF AT WHAT POINT IN TIME SHOULD A DEFENDANT'S WORTH BE DETERMINED FOR PURPOSES OF ASSESSING PUNITIVE DAMAGES.

ALSO, I POINT OUT IN THIS CASE THAT THE EVIDENCE REFLECTED, WITH RESPECT TO MR. FRAIDIN, THAT WHEN IT WAS CONVENIENT FOR MR. FRAIDIN TO HAVE A HIGH NET WORTH, THERE WAS A

HIGH NET WORTH. WHEN IT WAS CONVENIENT FOR MR* FRAIDIN TO HAVE A LOW NET WORTH, HE WAS ABLE TO PRODUCE DOCUMENTS SHOWING A LOW NET WORTH, AND THEREFORE, IT WAS UP TO THAT GROUP OF TWELVE PEOPLE THAT ULTIMATELY SAT IN JUDGMENT TO DETERMINE WHAT THEY FELT THE NET WORTH WOULD BE, AND AT WHAT POINT IN TIME.

BECAUSE OF THE CONFLICTING EVIDENCE WE HAD -- AND WHEN YOU CONSIDER A JURY, THEY ARE THE TRIER OF THE FACT. HAD I BEEN SITTING AS THE TRIER OF FACT, I WOULD HAVE HAD TO HAVE MADE THE DECISION, BUT THE JURY WAS SITTING AS THE TRIER OF FACT, AND THEY DID IN FACT DETERMINE A NET WORTH--

STRIKE THAT.

THEY DID IN FACT ASSESS A PUNITIVE DAMAGE.

UNFORTUNATELY, AS THE COURT OF SPECIAL APPEALS POINTED OUT, I DIDN'T GIVE THE JURY COMPLETE INSTRUCTIONS, BUT BEAR IN MIND, THIS IS SOMEWHAT OF A NOVEL QUESTION IN MARYLAND, AND ACCORDING TO JUDGE BISHOP, AS I UNDERSTAND, THIS MAY HAVE BEEN THE FIRST CASE TO REALLY ADDRESS DIRECTLY THE DUE PROCESS ISSUE IN MARYLAND.

SO AS TO WHETHER OR NOT WE MUST AFFIX A POINT IN TIME TO THEN DETERMINE WHAT MR. FRAIDIN'S NET WORTH WOULD BE, WE DO NOT HAVE ABSOLUTE DIRECTION, BUT IT IS A MATTER FOR LEGITIMATE CONCERN, BUT THE EVIDENCE IN THE TRIAL RAN THE GAMUT CONCERNING MR. FRAIDIN'S NET WORTH IN TERMS OF THE AMOUNT AND TIME. WE HEARD EVIDENCE RANGING FROM 1981 THROUGH

SEVERAL YEARS. THERE WERE NO TAX RETURNS FILED BY MR. FRAIDIN FOR '88, '89 AND '90, WHICH WOULD HAVE GIVEN US MORE DIRECTION.

SO THE JURY MADE THE BEST DECISION THEY COULD FROM ALL OF THE EVIDENCE, BUT I POINT OUT WHEN IT WAS CONVENIENT FOR MR. FRAIDIN TO HAVE A LOW NET WORTH HE COULD PRODUCE DOCUMENTATION TO THAT EFFECT, AND WHEN IT WAS CONVENIENT FOR MR. FRAIDIN TO HAVE A SUBSTANTIAL NET WORTH, HE COULD PRODUCE DOCUMENTATION TO THAT EFFECT. SO I IMAGINE THAT THE JURY HAD A RATHER DIFFICULT DECISION TO MAKE.

I DIFFER FROM MR. O'DOHERTY WHEN HE SUGGESTS THAT THE DEGREE OF MALICE SHOULD BE CONSIDERED AS A FACTOR IN DETERMINING THE AMOUNT IN ORDER TO BE REMITTED.

THE COURT OF SPECIAL APPEALS REMANDED THE CASE. THEY FOUND THAT MALICE DID, IN FACT, OCCUR. THEY DID NOT GIVE ANY DIRECTIONS WITH RESPECT TO DEGREES OF MALICE. THAT DECISION HAD ALREADY BEEN RESOLVED BY THE JURY AND THE COURT, BUT THE COURT DID SEND IT BACK ON THE ISSUE OF CONSIDERING AND RESOLVING THE ISSUE OF PUNITIVES SUCH THAT IT WOULD NOT BE A VIOLATION OF MR. FRAIDIN'S NET WORTH.

WHAT I AM GOING TO DO IS REQUIRE THE PLAINTIFFS TO REMIT ONE HALF THE PUNITIVE DAMAGES WITH RESPECT TO MR. WEITZMAN AND ONE HALF THE PUNITIVE DAMAGES WITH RESPECT TO MR. BRAITERMAN, SHELDON BRAITERMAN, P.A.

THE PUNITIVE DAMAGES ASSESSED AGAINST

MR. FRAIDIN IN THE CASE OF -- INVOLVING MR. BRAITERMAN OR BRAITERMAN, P.A. WILL BE TWO HUNDRED FIFTY THOUSAND DOLLARS.

WHAT WAS THE TOTAL AMOUNT AS TO MR. WEITZMAN?

MR. FRAIDIN: TWO AND A HALF MILLION, YOUR HONOR.

THE COURT: WHAT'S HALF OF THAT, MR. FRAIDIN?

MR. FRAIDIN: ONE MILLION, ONE HUNDRED TWENTY-FIVE THOUSAND.

MR. O'DOHERTY: ONE MILLION, TWO HUNDRED FIFTY --

THE COURT: YOU ARE CORRECT, ONE MILLION, TWO HUNDRED FIFTY THOUSAND.

GENTLEMEN, THAT IS WHAT THE PUNITIVE DAMAGES WILL BE ASSESSED AT.

MR. O'DOHERTY: SIR, WE HAVE -- WE HAVE ORDERS PREPARED, AND I CAN TELL YOU RIGHT NOW THEY JUST HAVE TO FILL IN THE BLANKS, BUT WE ARE CONSENTING TO THE REMITTITUR AT THIS TIME.

THE COURT: FILL IN THE BLANKS, PLEASE, AND THEN I WILL SIGN THE ORDERS.

MR. FRAIDIN: I WISH TO MAKE SURE THAT -- MAYBE I SHOULD HAVE DONE IT PRIOR TO YOU GIVING THE VERDICT, BUT TO MAKE SURE THAT CERTAIN DOCUMENTED EVIDENCE THAT IS IN THE CASE REMAINS IN THIS PARTICULAR HEARING, AND I THINK IT ALL REMAINS IN IT BECAUSE --

THE COURT: IT'S STILL OPEN.

MR. FRAIDIN: YES, I WOULD HOPE SO.

MAY I, FOR THE RECORD, MAKE SURE THAT

CERTAIN DOCUMENTS -- I WANT TO MAKE SURE PLAINTIFF'S PRIOR COUNSEL NEVETT STEELE'S MOTION FOR NEW TRIAL AND REMITTITUR VERDICT --

THE COURT: JUDGMENT N.O.V.

MR. FRAIDIN: AND COUNSEL EUGENE HETTLEMAN'S MOTIONS ARE STILL BEFORE THE COURT AS EXHIBITS IN THE REMITTITUR HEARING, AND THAT THE OTHER DOCUMENTS PRESENTED DURING THE PUNITIVE DAMAGE PHASE OF THE TRIAL, SPECIFICALLY THE FINANCIAL STATEMENT OF JACOB FRAIDIN, JUNE 30, 1990, IS AN EXHIBIT AND THE PRIOR STATEMENT OF JUNE 30, 1985 IS AN EXHIBIT.

THE COURT: MR. FRAIDIN, I DON'T KNOW THAT THE CLERK'S OFFICE EVEN HAS THE FILE BACK FROM ANNAPOLIS AS OF YET, BUT ALL OF THE EVIDENCE THAT WAS PRODUCED IS GOING TO BE CONSIDERED IF THIS DECISION IS APPEALED.

MR. FRAIDIN, IF THERE -- IF THE EVIDENCE OR ANY OF IT IS MISSING, THEN WE WILL TAKE THE PROPER COURSE.

MR. FRAIDIN: OKAY, YOUR HONOR.

I WOULD ASSUME THAT AS OF TODAY A -- A FINAL APPEALABLE JUDGMENT IS BEING ENTERED IN THIS CASE.

THE COURT: YES.

MR. FRAIDIN: IS THAT CORRECT, YOUR HONOR?

THE COURT: YES.

MR. FRAIDIN: THANK YOU.

MR. O'DOHERTY: SIR, WE ARE HANDING UP FIRST THE ORDER GRANTING THE CONDITIONAL REMITTITUR SETTING FORTH THE SIGNATURES THAT YOUR HONOR HAS JUST ENUNCIATED, AND WE WOULD

ASK THAT THE ORDER BE SIGNED, PLEASE.

WE NEXT SUBMIT THE PLAINTIFF'S CONSENT TO THE REMITTITUR EXECUTED HERE TODAY.

MR. FRAIDIN: I WOULD HAVE CERTAIN OBJECTIONS THAT I WOULD LIKE TO PLACE ON THE RECORD CONCERNING THE WORDING IN THESE TWO ORDERS.

I DON'T BELIEVE THEY--

THE COURT: WHAT IS YOUR OBJECTION?

MR. FRAIDIN: WELL, COUNSEL, NUMBER ONE, IN THE ORDER HAS PUT PLUS COSTS. THE COURT OF SPECIAL APPEALS HAS ALREADY MADE THEIR DETERMINATION OF HOW COSTS SHOULD BE APPORTIONED IN THIS CASE. I AM NOT SURE IF THAT WAS SENT BACK FOR REMITTITUR CONSIDERATION, YOUR HONOR.

ALSO, I BELIEVE IN THE ORDER GRANTING CONDITIONAL NEW TRIAL OR IN THE ALTERNATIVE A REMITTITUR, I AM NOT CLEAR AS TO WHAT THE LAST THREE SENTENCES MEAN. THE DEFENDANT SHALL BE GRANTED A NEW TRIAL ON THE ISSUE OF THE AMOUNT OF PUNITIVE DAMAGES ONLY AGAINST EITHER PLAINTIFF WHO DOES NOT CONSENT --

THE COURT: WHEN YOU HAVE A REMITTITUR, MR. FRAIDIN, IT IS UP TO THE COURT TO DETERMINE HOW MUCH OF THE AWARD SHOULD BE REMOVED OR REMITTED.

MR. FRAIDIN: YES, YOUR HONOR.

THE COURT: IF THE PLAINTIFF DON'T AGREE TO IT, THEN A NEW TRIAL CAN TAKE PLACE.

MR. FRAIDIN: RIGHT, BUT --

THE COURT: A REMITTITUR IS A CONDITIONAL

MATTER.

MR. FRAIDIN: IN HERE IT SAY THE DEFENDANTS SHALL BE GRANTED A NEW TRIAL. THE DEFENDANTS ON THE ISSUE OF THE AMOUNT -- ONLY AGAINST THE PLAINTIFF WHO DOESN'T CONSENT.

THE COURT: BUT THEY ARE CONSENTING TO IT, SO IT IS NOT CONDITIONAL ONCE THEY CONSENT.

IF THEY THEN SAID THAT THEY DID NOT AGREE TO THE REMITTITUR, THEN A NEW TRIAL COULD OCCUR.

MR. FRAIDIN: THEY COULD REQUEST A NEW TRIAL.

WELL, AS LONG AS IT DOESN'T PROHIBIT ME FROM MY RIGHTS.

THE COURT: OF COURSE NOT, MR. FRAIDIN.

MR. O'DOHERTY: FINALLY, YOUR HONOR, WE SUBMIT AN ORDER NOW THAT THOSE -- I THINK THAT BOTH OF THOSE DOCUMENTS HAVE BEEN SIGNED.

THE COURT: YES.

MR. O'DOHERTY: WE SUBMIT A FINAL ORDER -- FINAL JUDGMENT, ORDER OF MODIFICATION, FINAL JUDGMENT.

MR. FRAIDIN: I BELIEVE THAT'S THE PART THAT SAYS PLUS COSTS, YOUR HONOR.

THE COURT: AND I AGREE TO THE PLUS COSTS. THEY ARE THE PREVAILING PARTY.

MR. FRAIDIN: YOUR HONOR, WHAT COSTS WOULD THOSE BE?

THE COURT: WHATEVER THE COSTS MAY BE. I DON'T KNOW. YOU'D HAVE TO CHECK WITH THE CLERK'S OFFICE TO DETERMINE WHAT COSTS IF ANY THERE ARE.

MR. FRAIDIN: THOSE COSTS WOULD NOT BE IN CONFLICT WITH WHAT THE COURT OF --

THE COURT: NO, MR. FRAIDIN.

MR. FRAIDIN: THANK YOU, YOUR HONOR.

THE COURT: HAVE THAT INCLUDED IN THE COURT FILE. THAT WAS INCLUDED AS AN EXHIBIT BY MR. O'DOHERTY.

ANYTHING ELSE, GENTLEMEN?

MR. O'DOHERTY: NO, YOUR HONOR.

THE COURT: AS USUAL, IT'S BEEN VERY INTERESTING.

MR. MOORE, DO YOU HAVE THE COURT FILE HERE?

THE CLERK: NO, I DON'T.

THE COURT: I WANT MR. WEITZMAN'S MEMORANDUM TO BE ATTACHED TO THE COURT FILE, SO SEE -- IF IT ISN'T THAT IT IS ATTACHED.

<u>CONCLUSION</u>

REPORTER'S CERTIFICATE

I, LESLIE ELISE GROSS, AN OFFICIAL COURT REPORTER OF THE CIRCUIT COURT FOR BALTIMORE CITY, DO HEREBY CERTIFY THAT I RECORDED STENOGRAPHICALLY THE PROCEEDINGS IN THE MATTER OF ANDRE WEITZMAN, ET AL VS. JACOB FRAIDIN, ET AL IN THE CIRCUIT COURT FOR BALTIMORE CITY ON FEBRUARY 25, 1993.

I FURTHER CERTIFY THAT THE FOREGOING PAGES CONSTITUTE THE OFFICIAL TRANSCRIPT AS TRANSCRIBED BY ME FROM MY STENOGRAPHIC NOTES TO THE WITHIN COMPUTER-AIDED TRANSCRIPT IN A COMPLETE AND ACCURATE MANNER.

IN WITNESS WHEREOF, I HAVE HEREUNTO SUBSCRIBED MY NAME THIS 17TH DAY OF MARCH, 1993.

94-1230

NO.

Supreme Court, U.S.
F I L E D
APR 10 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

JACOB FRAIDIN,

Petitioner,

V.

ANDRE' R. WEITZMAN, et al.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI IN THE COURT OF SPECIAL APPEALS OF MARYLAND

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

Andre' R. Weitzman, Esq.
8 East Mulberry Street
Baltimore, Maryland 21202
(410) 727-3505
Respondent Pro Se

Patrick A. O'Doherty, Esq.
10 East Baltimore Street
Suite 800
Baltimore, Maryland 21202
(410) 837-1828
Counsel for Respondent
Sheldon H. Braiterman, P.A.

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Is a defendant who has been assessed punitive damages by a jury entitled to have evidence not submitted to the jury considered by a trial judge in a state court proceeding upon a remand to reconsider the defendant's motion for remittitur?

2. Is a defendant who routinely fabricates conflicting financial information under oath entitled to have endless hearings in order to have his conflicting financial evidence considered?

3. Does the award of punitive damages in this case comport with due process where there was evidence of an actual intent to harm accompanied by threats of force and violence?

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STATEMENT OF THE CASE

The facts of this case are fairly presented in the first opinion of the Court of Special Appeals of Maryland attached to the petition at pages 12a through 47a. The following is a summary of those facts.

On February 13, 1986, respondents Andre' R. Weitzman ("Weitzman") and Sheldon H. Braiterman, P.A. ("Braiterman") (collectively "Weitzman") members of the Maryland Bar, filed a five count complaint against petitioner Jacob Fraidin and his two related companies Pacific Mortgage & Investment Group, Ltd., North American Credit Corporation ("Fraidin"), two law firms that had represented Fraidin, and Ray and Margarette Dorman ("The Dormans"), former clients of Weitzman. The core allegations of the Complaint concerned

malicious interference with contract and conspiracy.

This suit arose from the aftermath of a previous case which resulted in a judgment being entered against Fraidin and his companies. In the prior case, Weitzman represented the Dormans against Fraidin on claims of fraud and violation of State Truth-In- Lending Statutes.

The Dormans had sought out Fraidin, then a licensed mortgage broker, in the hopes of obtaining a bill consolidation loan. Fraidin, acting as the Dormans' broker, arranged a loan for the Dormans with another company (North American) secretly owned by Fraidin. In consummating that mortgage loan Fraidin failed to disclose to the Dormans that the interest rate being charged was 50% per annum and he also

required the Dormans to sign a false statement that the loan was for business or commercial purposes. Six months after receiving net loan proceeds of $8,000.00, the Dormans were forced to repay over $18,000.00 to Fraidin in order to clear the title to their home upon its sale to a third party.

A jury in the Circuit Court for Baltimore County, Maryland, hearing the evidence of the Dormans against Fraidin awarded compensatory damages of $67,000.00 and punitive damages of $300,000.00. During that trial, Fraidin testified that a financial statement that he prepared specifically for trial showed his net worth as of June 30, 1985 to be $393,000.00. During post-trial discovery in aid of execution it was learned by Weitzman that

Fraidin had given a detailed financial statement under oath to the Western Surety Co. swearing to a net worth of $3.125 million also dated as of June 30, 1985. After learning of Weitzman's discovery of this discrepancy in the financial statements, Fraidin commenced a campaign of threats of violence and promises against the Dormans to induce them to discharge Weitzman, deprive him of his fee, and settle directly with Fraidin for $50,000.00 in crisp cash. Fraidin made it a specific condition of settlement that the Dormans discharge Weitzman and not pay him his fee. The Dormans succumbed to Fraidin's threats and inducements and settled directly with Fraidin after presenting written evidence to Fraidin that they had discharged Weitzman. Weitzman then filed suit in this case.

A bifurcated trial commenced on September 18, 1990. At the close of all evidence, the jury was instructed on liability for interference with contract and conspiracy, compensatory damages and liability for punitive damages. On December 20, 1990, the jury, by special verdict, found in favor of Weitzman and Braiterman against Fraidin on Count IV, malicious interference with contract, and awarded separate compensatory damages of $91,737.47 "plus interest" to each. The jury also found that Fraidin acted with actual malice and that punitive damages should be awarded in favor of Weitzman and Braiterman against Fraidin.

On January 16, 1991, the trial continued before the same jury with the reception of evidence on the issue of the

amount, if any, of punitive damages. The evidence of Fraidin's net worth consisted of various statements made under oath by Fraidin to the Western Surety Company which Fraidin admitted were true. These statements placed Fraidin's net worth as of June 30, 1985 at $3.125 million dollars. Fraidin produced no evidence to show that his net worth had diminished since that statement. Although given the opportunity, and under subpoena to do so, Fraidin produced no tax returns for the intervening years, no deeds to real estate, no bank accounts, or other relevant evidence.

On January 18, 1991, the jury awarded punitive damages in favor of Weitzman in the sum of $2,500,000.00 and in favor of Braiterman in the sum of $500,000.00. On January 30, 1991, the court entered judgment

in favor of Weitzman and Braiterman against Fraidin in the sum of $139,842.91 in compensatory damages and $2,500,000.00 in punitive damages, and in favor of Braiterman against Fraidin in the sum of $139,842.81 compensatory damages and $500,000.00 punitive damages.

On May 3, 1991, the court denied the post-trial motions of Fraidin which included a motion for a remittitur of the jury's verdict. On May 15, 1991, Fraidin noted a timely appeal. The Court of Special Appeals of Maryland vacated the punitive damages and remanded the case to the trial judge to reconsider Fraidin's motion for a remittitur because the punitive damage award consumed all of Fraidin's proven net worth, or if the remittitur were rejected by Weitzman, direct a new trial. Fraidin v. Weitzman, 93 Md.

App. at 216, 611 A.2d at 1070. (Appendix to Petition at pages 42a-43a) With the exception of prejudgment interest, the Court of Special Appeals affirmed the remaining judgments. The Court of Appeals of Maryland denied certiorari on January 21, 1993.

The trial court granted Fraidin's motion for remittitur at a hearing held on February 25, 1993, reducing the punitive damage awards by 50%. The Court of Special Appeals affirmed the judgment of the trial court on March 29, 1994. The Court of Appeals of Maryland denied Fraidin's petition for a writ of certiorari on September 14, 1994.

REASONS FOR DENYING THE WRIT

I. Petitioner's Evidence of Net Worth

Rule 15 of this Court directs counsel to point out misstatements of fact and law

so that the Court will not be misled into improvidently granting certiorari. This petitioner is attempting to obtain his Writ by doing exactly what Rule 15 is designed to prevent.

This pro se petitioner has developed a well deserved reputation for dishonesty, particularly when it comes to his finances, which have been noted by State and Federal Courts. Commenting on the petitioner's modus operandi in affirming his felony conviction for theft while acting as a foreclosure trustee, the Court of Special Appeals remarked:

> The permissible picture emerges of Fraidin as an extremely clever manipulator who, if he did not initially have larceny in his heart, at least had avarice in his heart. To feed that avarice, he created at-times labyrinthine confusion. He then sought to exploit that confusion to his own advantage. Although arguably intending to stay carefully within legal limits he would skirt perilously close to the line. If in

such a maneuver he inadvertently stepped out of bounds and the referee blew the whistle on him, it is not the occasion for any great outpouring of sympathy.

Fraidin v. State, 583 A.2d 1065, 1081 (Md. Ct. Spec. App. 1990).

Consistent with this previous disposition for dishonesty, the petitioner highlights to this Court his post-judgment bankruptcy petition under Chapter 11 as the most significant change in his financial position justifying a new evidentiary hearing to determine punitive damages. Recently, the United States Court of Appeals for the Fourth Circuit affirmed the appointment of a Chapter 11 Trustee over the petitioner's case based on a record which supported findings by the Bankruptcy Court that it had "absolutely no confidence in the debtor in terms of his capacity to honestly administer his own Chapter 11

bankruptcy....."

In Re Fraidin, United States Court of Appeals - Fourth Circuit No. 94-1658. (Slip opinion attached hereto as appendix to Reply Brief at page 1a-4a)

In addition to the felony conviction, the appointment of a trustee was supported by the petitioner's undisclosed use of aliases and his "evasive, self-serving, unclear, and obviously not forthcoming" testimony before the Bankruptcy Court. (Appendix to Brief, 2a. Slip Opinion In Re Fraidin at page 2)

What was not discussed by the panel of the Fourth Circuit but which appears in the record of that case is that the petitioner was making secret direct payments to the Court appointed examiner who was forced to resign. (Appendix to Brief, 7a,

portions of Transcript December 16, 1993 pages 90-94, U.S. Bankruptcy Ct. for the Dist. of Md.) This examiner is the same person whom the petitioner argues at page 13 of his petition should have been allowed to testify after the remand from the Court of Special Appeals. (See also, Appendix to Petition, page 59a)

In the proceedings below all evidence of the petitioner's net worth came from documents that he created and signed under oath. As the trial judge noted:

> When it was convenient for Mr. Fraidin to have a low net worth he could produce documentation to that effect, and when it was convenient to have a substantial net worth, he could produce documentation to that effect
> (Appendix to Petition at page 90a)

The State Appellate Court in Fraidin I and II reviewed the conflicting evidencing of net worth carefully and concluded that it

was a matter for the jury. The Petitioner's argument now is that due process should give him one more chance to convince people of his true net worth, now that his unfavorable versions of net worth were apparently accepted.

The Petitioner had a full and fair opportunity to present evidence of his net worth to the jury. Instead of presenting bank accounts, business records and tax returns, he relied on fabricated documents showing amounts and transactions which could not be independently verified.

Even the Petitioner's schedules in bankruptcy show that the evidence he offered at trial must have grossly understated his net worth. At trial, the Petitioner offered self-created financial statement showing a net worth of $250,000.00. (Appendix to

Petition 37a) Nine months later when the Petitioner filed his schedules in his bankruptcy case, his net worth (exclusive of this judgment) was at least $800,000.00. (Appendix to Brief 15a)

II. The Maryland Practice of Remittitur Complies with Due Process

Under existing Maryland law, a trial judge deciding whether to grant a remittitur is precluded from considering matters not placed before the jury. This is consistent with federal law, which the Maryland Courts look to for guidance. See, Banegura v. Taylor, 312 Md. 609, 612, 541 A.2d 969, 976 (1990).

The practice of remittitur does not violate due process. In exercising its discretion to grant a motion for new trial and permitting the plaintiff the alternative of a remittitur, the trial court is

reviewing the amount of a judgment for an error of law, not a question of fact. See, McKennon v. City of Berwyn, 750 F.2d 1383, 1392 (7th Cir. 1984). The trial court, finding that a verdict is excessive, must: (1) direct the plaintiff to remit only that portion of the verdict which constitutes error of law, and (2) allow plaintiff the option of a new trial to preserve his constitutional right to a jury trial. See, Earl v. Bouchard Transp. Co., Inc., 917 F.2d 1320, 1327-29 (2nd Cir. 1990). See also, K-B Trucking Co. v. Riss Intern. Corp., 763 F.2d 1148, 1662-63 (10th Cir. 1985). Lastly, to make a determination of the amount to be remitted, only the evidence presented at trial can be considered. See, Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1384 (10th Cir. 1989). ("The

district court is without discretion to reduce or eliminate punitive damages on the basis of events occurring after the trial.")

The remand to the trial court for reconsideration of the petitioner's motion for remittitur did not entitle the petitioner to a new evidentiary hearing. Unhappy with his success on his motion for remittitur, the petitioner now represents the record as being devoid of such a motion, although that is clearly not the case. (See Appendix to Petition, page 6a, note 3)

The hearing to reconsider the motion for remittitur was not a new assessment of punitive damages. The only matter before the trial court on remand was to correct the jury's verdict based on an error of law. That was precisely the relief requested by the Petitioner in his motion, and in his

first appeal. Due process does not require a new evidentiary hearing in this instance.

III. The Award of Punitive Damages does not Violate Due Process Under the Facts of this Case

This Court has never held that due process requires some sort of precise ratio between compensatory and punitive damages, or between punitive damages and a defendant's net worth. Of the three due process components identified in Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991), the petitioner argues only that the third component, the size of the award, violates due process.

The facts of this case justify a substantial award of punitive damages. The petitioner acted with a very high degree of malice towards Weitzman and displayed utter contempt for our system of justice.

If the Court were to grant certiorari on this issue then its role in this case would be one of simply playing super-jury, substituting its judgment for that of the actual jury in weighing the relative value of conduct worthy of punitive damages. This would require all appellate courts to then review each award of punitive damages and make its own decision of whether a remittitur should be granted on appeal regardless of existing standards for reviewing the decisions of juries and trial courts. This type of appellate review of factual findings based solely on a dry record is contrary to longstanding appellate jurisprudence in this country that prefers factual determinations to be made by triers of fact who have had the opportunity to hear and observe the witnesses.

A judicially imposed ratio limiting awards of punitive damages would defeat the main purpose of punitive damages. An award of punitive damages should reflect many factors, including the type of conduct, the degree of malice, the relative positions of the parties, the harm suffered, and the defendant's ability to pay. To set a precise ratio would reduce punitive damages to simply another cost of doing business, which if low enough relative to the anticipated gain, may be ineffective to deter wrongful conduct.

IV. Maryland Law on Tortious Interference with Contract is not Reviewable by This Court Under the Facts of This Case

The petitioner completely misreads and misrepresents the case of Alexander & Alexander v. B. Dixon Evander & Associates Inc., 336 Md. 635, 650 A.2d 260 (1994) cited

in support of his supplemental petition.

Initially, whether particular conduct constitutes tortious interference with contract under State law raises no issue reviewable by this court, absent any element of free speech, interstate commerce or other federal issue. The Alexander case does not contain even a hint of any federal issue, nor does the petitioner's case.

Apart from the lack of any substantial federal issue in considering whether the petitioner's conduct is sanctionable under State law, there was ample evidence in the record to support the jury's finding that the petitioner committed tortious interference with contract motivated by actual malice. Fraidin v. Weitzman, supra, 93 Md. App. at 202-05. (Appendix to Petition at pages 28a-29a)

CONCLUSION

For the aforegoing reasons the respondents request that the petition be denied, with costs.

Andre R. Weitzman, Esq.
8 East Mulberry Street
Baltimore, Maryland 21202
(410) 727-3505
Respondent Pro Se

Patrick A. O'Doherty, Esq.
10 East Baltimore Street
Suite 800
Baltimore, Maryland 21202
(410) 837-1828
Counsel for Respondent
Sheldon H. Braiterman, P.A.

NO.

IN THE

Supreme Court of the United States

October Term, 1994

JACOB FRAIDIN,

Petitioner,

V.

ANDRE' R. WEITZMAN, et al.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI IN THE COURT OF SPECIAL APPEALS OF MARYLAND

APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI

Andre' R. Weitzman, Esq.
8 East Mulberry Street
Baltimore, Maryland 21202
(410) 727-3505
Respondent Pro Se

Patrick A. O'Doherty, Esq.
10 East Baltimore Street
Suite 800
Baltimore, Maryland 21202
(410) 837-1828
Counsel for Respondent
Sheldon H. Braiterman, P.A.

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In Re: JACOB FRAIDIN,
Debtor.

JACOB FRAIDIN,
Plaintiff-Appellant,
v.
ANDRE WEITZMAN; SHELDON H. BRAITERMAN,
Defendants-Appellees.

No. 94-1658

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
J. Frederick Motz, District Judge.
(CA-94-352-JFM, BK-91-857)

Argued: November 3, 1994

Decided: December 9, 1994

Before RUSSELL, WILKINS, and HAMILTON,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Janet Marsha Nesse, GINS & SEEBER, P.C., Washington, D.C., for Appellant. Andre R. Weitzman, Baltimore, Maryland,

for Appellees. **ON BRIEF:** Sheldon H. Braiterman, Baltimore, Maryland, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Jacob Fraidin appeals the decision of the district court upholding the appointment of a Chapter 11 trustee by the bankruptcy court. Because we conclude that the appointment of a trustee was not an abuse of discretion, we affirm.

I.

After Fraidin filed for protection under Chapter 11 of the Bankruptcy Code, two creditors with outstanding judgments against Fraidin moved for the appointment of a trustee. At the conclusion of a two-day hearing, the bankruptcy court stated that it was appointing a trustee because it had "absolutely no confidence in the debtor in terms of his capacity to honestly administer his own Chapter 11 bankruptcy."

The bankruptcy court based its decision on what it called "a multitude of factors," one of which was pre-petition dishonesty. Fraidin is a convicted felon, having been found guilty of theft while acting as a foreclosure trustee. *See Fraidin v. State*, 583 A.2d 1065 (Md. Ct. Spec. App.), *cert. denied*, 589 A.2d 57 (Md. 1991).* More recently,

---

*The Maryland Court of Special Appeals wrote: "The permissible picture emerges of Fraidin as an extremely clever manipulator of complicated commercial transactions who . . . at least had avarice in his heart. To feed that avarice, he created at-times labyrinthine confusion. He then sought to exploit that confusion to his own advantage." *Fraidin*, 583 A.2d at 1081.

Fraidin was found liable in a civil action for tortious interference with contract and civil conspiracy and was ordered to pay $1.5 million in punitive damages. Also, the bankruptcy judge found that Fraidin had used aliases as late as 1986, but did not disclose those names as required on the bankruptcy petition. Moreover, the bankruptcy court found that Fraidin had no credibility, given his "evasive, self-serving, unclear, and obviously not forthcoming" testimony during the hearing.

II.

The appointment of a trustee is provided for in 11 U.S.C.A. § 1104(a) (West 1993):

> [O]n request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—
>
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case . . . ; or
>
> (2) if such appointment is in the interests of creditors.

Since the Bankruptcy Code favors allowing a debtor in possession to continue managing its business operations, the appointment of a trustee in a Chapter 11 case is an extraordinary remedy; it "is the exception rather than the rule." *In re U.S. Communications of Westchester, Inc.*, 123 B.R. 491, 495 (Bankr. S.D.N.Y. 1991).

The decision of whether a debtor's conduct justifies the appointment of a trustee is a matter committed to the discretion of the lower courts. *See Committee of Dalkon Shield Claimants v. A.H. Robins Co.*, 828 F.2d 239, 242 (4th Cir. 1987). Here, the decision was made in the first instance by the bankruptcy court and affirmed by the district court. This court, as a second court of review, considers the decision of the bankruptcy court under the same standards that apply to the district court. *Brown v. Pennsylvania State Employees Credit*

Union, 851 F.2d 81, 84 (3d Cir. 1988). Thus, the question here is not whether this court would have appointed a trustee had it been deciding the question in the first instance, but whether the bankruptcy court abused its discretion in appointing a trustee. Findings of fact by the bankruptcy court are reviewable by this court only for clear error and legal questions are subject to de novo review. *Canal Corp. v. Finnman (In re Johnson)*, 960 F.2d 396, 399 (4th Cir. 1992); Bankr. R. 8013.

Fraidin argues that the evidence was insufficient to support the appointment of a trustee, noting that he was not delinquent in any filings related to his bankruptcy case and that no evidence was presented that he was engaged in any improper conduct at the time the hearing was held. Thus, he claims, the appointment was improper.

We conclude that the findings of the bankruptcy court—that Fraidin had engaged in a prolonged pattern of dishonest conduct and had no credibility at the hearing—are supported by the record. Section 1104(a)(1) expressly provides that dishonesty, whether before or after the filing of the bankruptcy petition, justifies the appointment of a trustee. The bankruptcy court considered Fraidin's evidence of his proper conduct regarding his bankruptcy case, but nonetheless found that his pattern of dishonesty justified the appointment of a trustee. We find no abuse of discretion and accordingly affirm the order of the district court.

AFFIRMED

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

IN RE:	*	Case No. 92-5-2338-JS
	*	(Chapter 11)
JACOB FRAIDIN	*	
	*	
Debtor	*	
**********		
ANDRE' R. WEITZMAN	*	Advers. No.92-5210-JS
SHELDON H. BRAITERMAN,	*	
Plaintiffs,	*	
	*	
v.	*	
	*	
JACOB FRAIDIN,	*	101 W. Lombard Street
	*	Baltimore, MD 21201
Defendant.	*	December 16, 1993
	*	2:20 P.M.
**********		

TRANSCRIPT OF HEARING ON MOTION FOR APPOINTMENT OF TRUSTEE AND MOTION TO STRIKE ORDER OF DISMISSAL BEFORE THE HONORABLE JAMES F. SCHNEIDER UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

For the Debtor: JANET M. NESSE, ESQUIRE
2021 L Street, N.W.
Suite 200
Washington, DC 20036

For Sheldon H. Braiterman: SHELDON H. BRAITERMAN, PRO SE
33 S. Charles St., 4th Fl.
Baltimore, MD 21201

For Andre' R. Weitzman: ANDRE' R. WEITZMAN, PRO SE
8 East Mulberry Street
Baltimore, MD 21202

For the U.S. Trustee: KAREN MOORE, ESQUIRE
300 W. Pratt Street
Baltimore, MD 21201

Audio Operator: NANCY WALKER

Transcription Service: MONIQUE E. GIBSON
M.E.G. TYPING &
TRANSCRIPTION

THE COURT: THANK YOU. I'M GOING TO APPOINT A TRUSTEE. I HAVE ABSOLUTELY NO CONFIDENCE IN THE DEBTOR IN TERMS OF HIS CAPACITY TO HONESTLY ADMINISTER HIS OWN CHAPTER 11 BANKRUPTCY, AND THAT IS BASICALLY THE REASON FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE UNDER THE TERMS REQUIRED BY THE BANKRUPTCY CODE.

NOW, THERE ISN'T JUST ONE FACTOR THAT THE COURT COULD POINT TO TO JUSTIFY THE APPOINTMENT OF A TRUSTEE. THERE ARE A MULTITUDE OF FACTORS AND THEY ALL WEIGH AGAINST MR. FRAIDIN. THE FIRST FACTOR IS THAT BASICALLY HE IS OPERATING WHAT AMOUNTS TO A CORRUPT BUSINESS. HE'S A LOAN SHARK. THE BUSINESS IS A CORRUPT PRACTICE THAT HAS BEEN SANCTIONED ANY NUMBER OF TIMES IN CIVIL JUDGMENTS AND IN ADMINISTRATIVE SANCTIONS. THE REASON THE CASE WAS FILED IS BECAUSE OF

THE PUNITIVE DAMAGES THAT WERE ASSESSED AGAINST HIM FOR WHAT HE WAS DOING. THE CODE SPEAKS OF PRE-PETITION DISHONESTY AS ONE BASIS FOR APPOINTING A TRUSTEE, AND I THINK THERE'S AMPLE EVIDENCE OF JUST SUCH PRE-PETITION DISHONESTY, IF NOT OUTRIGHT FRAUD. AND I'M NOT NECESSARILY BASING THIS ON HIS CRIMINAL CONVICTION, BUT ON THE ENTIRE BACKGROUND THAT IS PRESENTED IN THIS CASE.

MR. FRAIDIN HAS DEMONSTRATED IN THE PAST THAT AN EXAMINER IS INEFFECTUAL IN GETTING TO THE BOTTOM OF WHAT IS GOING ON IN HIS CASE. MR. WOLFSON MAY HAVE BEEN AN OBJECTIVE PERSON WHEN HE WAS APPOINTED, BUT HE WAS PAID BY MR. FRAIDIN DIRECTLY, IMPROPERLY, AND NOT PURSUANT TO COURT ORDER. AS FAR AS I'M CONCERNED, WHATEVER MR. WOLFSON'S QUALIFICATIONS AND WHATEVER MR. WOLFSON'S ABILITY, THAT FACT ABSOLUTELY

NEUTRALIZED WHATEVER OBJECTIVITY HE MIGHT HAVE HAD.

NOW, IT IS OBVIOUS TO ME THAT THE MOVANT OR MOVANTS ON THE MOTION FOR THE APPOINTMENT OF THE TRUSTEE ARE OBVIOUSLY AT ODDS WITH MR. FRAIDIN BECAUSE THEY WERE THE INDIVIDUALS WHO ARE IN LITIGATION WITH THEM, BUT THEY HAVE POINTED TO ENOUGH INSTANCES THAT INDICATE TO THE COURT THAT THERE IS A BASIS FOR THE APPOINTMENT OF A TRUSTEE. IN SOME RESPECTS, THE APPOINTMENT OF A TRUSTEE IS IN MR. FRAIDIN'S INTEREST TO CLEAR THE AIR AND TO ENSURE THAT FUTURE ACTIVITIES OF HIS WILL BE UNDER THE SCRUTINY OF A TRUSTEE WHO WILL BE IN CONTROL OF THE BANKRUPTCY CASE.

MR. FRAIDIN'S OWN TESTIMONY OVER TWO DIFFERENT DAYS IN THIS COURT HAS CONVINCED ME THAT HIS CREDIBILITY IS NIL. AND I'M NOT

NECESSARILY SAYING THAT HE HAD TO BE A NICE PERSON ON THE WITNESS STAND AND THAT HE WASN'T BECAUSE I UNDERSTAND THAT HE'S BEING QUESTIONED BY ADVERSE PARTIES WHO HAVE BEEN IN LITIGATION WITH HIM. BUT HIS TESTIMONY WAS DURING MOST OF IT WAS EVASIVE, SELF-SERVING, UNCLEAR, AND OBVIOUSLY NOT FORTHCOMING. HE'S BEEN KNOWN IN THE COMMUNITY, HE SAYS, BY DIFFERENT NAMES. THOSE NAMES HAVE NOT BEEN DISCLOSED IN THE BANKRUPTCY PETITION THAT HE FILED. HE SAYS THAT AS LATE AS 1986 HE WAS KNOWN IN THE COMMUNITY AS IRV JACOBS. WHERE IS THAT IN THE PETITION? IT'S NOT IN THERE ANYWHERE.

I CAN'T IMAGINE A CASE THAT CRIES OUT FOR A CHAPTER 11 TRUSTEE MORE THAN THIS ONE, IF ONLY TO MAKE SURE THAT THE PUBLIC WILL BE PROTECTED IN THE OPERATION OF THIS MAN'S BUSINESS. THIS IS THE ONE CHANCE POSSIBLY

THAT SOCIETY HAS TO PROTECT ITSELF AGAINST MR. FRAIDIN'S MISCONDUCT AND OFTTIMES QUESTIONABLE PRACTICES AS A BUSINESS PERSON.

THERE IS SUFFICIENT EVIDENCE IN THIS CASE, OVERWHELMING EVIDENCE, TO SUPPORT THE APPOINTMENT OF A TRUSTEE. THIS MAN IS FUNCTIONING AS A DEBTOR-IN-POSSESSION UNDER THE AEGIS OF THE BANKRUPTCY COURT. THE BANKRUPTCY COURT, FOR ITS OWN PROTECTION, OUGHT TO BE ABLE TO APPOINT A TRUSTEE IN QUESTIONABLE CASES LIKE THIS TO MAKE SURE THAT THE PUBLIC PERCEPTION OF THE PROCESS IS BEYOND CRITICISM. AND IF I DIDN'T APPOINT A TRUSTEE, I THINK THAT I WOULD BE JEOPARDIZING THE REPUTATION OF THE COURT FOR MAKING SURE THAT THE LAWS OF THIS CITY, STATE, AND NATION ARE PRESERVED AGAINST THE PRACTICES OF DEBTORS WHO ARE OPERATING UNDER THE PROTECTION OF THE BANKRUPTCY COURT.

SO THERE ARE A NUMBER OF REASONS FOR THE APPOINTMENT OF A TRUSTEE. I DON'T GET TO PICK WHO THAT PERSON WILL BE. THE U.S. TRUSTEE WILL DO THAT, BUT I WILL ORDER THAT A TRUSTEE IN CHAPTER 11 BE APPOINTED. AND I WOULD HOPE THAT, MS. MOORE, SOMEBODY WHO IS SOPHISTICATED AND EXTREMELY COMPETENT IN BUSINESS AFFAIRS WOULD BE THE PERSON THAT WOULD BE SELECTED, BUT AS TO WHO THAT PERSON IS, OBVIOUSLY THAT IS STRICTLY WITHIN THE PROVINCE OF YOUR OFFICE.

I HAVE NOTHING SPECIFIC TO COMPLAIN ABOUT MR. WOLFSON, BUT I DON'T THINK THAT AN EXAMINER, WHOEVER IT MIGHT BE, WOULD BE THE PROPER ROUTE TO FOLLOW IN THIS CASE BECAUSE AN EXAMINER IS NOT CLOTHED WITH THE POWERS OF A TRUSTEE. THE EXAMINER HAS LIMITED AUTHORITY TO INVESTIGATE EVENTS AND CONDUCT OF PARTIES. A TRUSTEE, ON THE OTHER HAND,

HAS SIGNIFICANT AUTHORITY TO GO BEYOND MERE INVESTIGATION AND TO INVOKE THE JURISDICTION OF THE COURT TO TAKE SOME ACTION, EITHER AGAINST THE DEBTOR OR AGAINST OTHERS ACTING EITHER IN CONCERT WITH THE DEBTOR OR AGAINST THE DEBTOR. THE TRUSTEE HAS THAT POWER. BUT THE TRUSTEE IS AN OBJECTIVE PERSON ACTING ON BEHALF OF CREDITORS, WHICH IS SOMETHING THAT THIS CASE HAS BEEN SORELY LACKING SINCE IT WAS FILED IN THE DISTRICT OF COLUMBIA.

SO, IN A NUTSHELL, THAT'S THE REASON TO APPOINT A TRUSTEE. AND, MS. MOORE, I WOULD HOPE THAT ALSO THAT THAT WOULD BE DONE FORTHWITH.

MS. MOORE: YES, YOUR HONOR. WE WILL CONSULT WITH THE PARTIES AND MAKE THE APPOINTMENT AND FILE THE APPROPRIATE PLEADINGS WITH YOUR HONOR AS QUICKLY AS

POSSIBLE.

THE COURT: I WOULD PREFER NOT TO RULE ON THIS OTHER MATTER PENDING THE APPOINTMENT OF A TRUSTEE, MR. WEITZMAN. ON THAT DISMISSAL, I WOULD LIKE TO SEE WHAT A TRUSTEE DOES FIRST. IT MAY MAKE EVERYTHING ELSE MOOT.

MR. WEITZMAN: THANK YOU.

THE COURT: THANK YOU ALL. GOOD LUCK TO YOU.

ALL: THANK YOU, YOUR HONOR.

THE CLERK: ALL RISE. THIS HONORABLE COURT NOW STANDS ADJOURNED.

(WHEREUPON, THE PROCEEDINGS ADJOURNED AT 4:50 P.M.)

CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE ELECTRONIC SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

_____ _____

MONTIQUE E. GIBSON
M.E.G. TYPING AND
TRANSCRIPTION

DATE

In re: Jacob Braidin

Case No: 91-00617

CLIENT'S COPY

UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF COLUMBIA

SUMMARY OF SCHEDULES

Schedule name	No. Sheets	Assets	Liabilities	Other
X (mark if attached)				
___ A - Real Property	2	420,000.00		
___ B - Personal Property	13	743,618.26		
___ C - Property Claimed as Exempt	11			
___ D - Creditors Holding Secured Claims	1		272,315.00	
___ E - Creditors Holding Unsecured Priority Claims	3		6,433.00	
___ F - Creditors Holding Unsecured Non-priority Claims	6		3,628,538.00	
___ G - Executory Contracts and Unexpired Leases	1			
___ H - Codebtors	2			
___ I - Current Income of Individual Debtors	2			7,000.00
___ J - Current Expenditures of Individual Debtors	3			6,289.00
Summary Sheet	1	**********	**********	
Total No. Sheets	45	**********	**********	
Total Assets ->		1,163,618.26	**********	
Total Liabilities ->			3,907,286.00	********
Total No. of Creditors ->			34	********
Excess Income (if any) ->				711.00

94-1230

NO.

FILED
MAY 1 1995
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

JACOB FRAIDIN,

Petitioner,

v.

ANDRE R. WEITZMAN, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JACOB FRAIDIN
3406 Fielding Road
Baltimore, Maryland 21208
(410) 484-2520
PRO SE

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

QUESTIONS PRESENTED

[These are the same Questions as presented in Petitioner's originally-filed Petition.]

1. At either a new hearing or new trial concerning punitive damages on remand, is additional relevant evidence regarding the net worth of a defendant admissible, particularly if there has been a change in defendants' financial condition since the original damage award?

2. Did the punitive damages figure entered at the remand hearing comply with due process requirements and other punitive damages standards, particularly in view the alleged conduct supposedly supporting such damages?

3. Was the punitive damages award so excessive as to violate due process?

PARTIES TO THE PROCEEDING

The parties to the proceeding, including those noted in the caption of this case, are:

Jacob Fraidin, Petitioner,

North American Credit Corporation (a party to the previous matters but not a Petitioner here),

Pacific Mortgage and Investment Corporation (a party to the previous matters but not a Petitioner here),

Andre Weitzman, Respondent, and

Sheldon Braiterman, Respondent.

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TABLE OF AUTHORITIES

Alexander & Alexander v. B. Dixon Evander & Associates, Inc.,
336 Md. 635, 650 A.2d 260 (1994) 8,9

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

JACOB FRAIDIN,
Petitioner,

v.

ANDRE R. WEITZMAN, et al.,
Respondents

PETITIONER'S REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION

Jacob Fraidin, proceeding pro se, under Supreme Court Rule 15.6 and Rule 33, here submits this Reply Brief to respond to the arguments and statements made in the Brief in Opposition.

OPINIONS BELOW

[See Petition and Supplemental Brief]

The case which is the subject of this Petition was decided by the Court of Special Appeals on March 29, 1994 (*Jacob Fraidin, et al. v. Andre Weitzman, et al.*, No. 935, September Term, 1993). [The opinion is set forth in the Appendix to the Petition, beginning at p. 1a].

The matter arose from a jury trial in the Circuit Court for Baltimore City on a Complaint by Respondents Andre Weitzman, Esq. and Sheldon Braiterman, Esq. (as Plaintiffs) against Petitioners Jacob Fraidin (Fraidin) and North American Credit Corporation, Pacific Mortgage & Investment Company (the Corporations) (as Defendants) and other Defendants not parties to this Petition. The Complaint was filed February 13, 1986. (The first trial ended in a mistrial).

Trial began on September 18, 1990. Petitioners, on

December 20, 1990, were assessed compensatory damages of $183,474.93. In a later punitive damages proceeding, the jury on January 18, 1991 assessed punitive damages against Petitioners of $3 million--$2.5 million for Mr. Weitzman and $500,000 for Mr. Braiterman. On May 3, 1991, the Circuit Court denied post-judgment motions. Defendants appealed.

On August 9, 1991, while the appeal was pending, Mr. Fraidin filed for bankruptcy. On September 26, 1991 relief from automatic stay was granted by the Bankruptcy Court. On October 15, 1991, the Court of Special Appeals ordered the appeal and other matters shall proceed.

On September 4, 1992, the Court of Special Appeals issued *Fraidin v. Weitzman*, 93 Md.App. 168, 611 A.2d 1046 (1992), *cert.den.*, 329 Md. 109, 617 A.2d 1055. The Court remanded the punitive damages award. Petitioners timely filed with the Court of Appeals of Maryland a petition for a writ of certiorari on other issues. This was denied on January 14, 1993.

On remand as to punitive damages, the Circuit Court (Hon. Thomas E. Noel, J.) on February 25, 1993, it conducted a hearing at which it declined to consider certain new evidence--including the fact that Mr. Fraidin had filed for bankruptcy.

The Circuit Court reduced the punitive damages award by half. It issued an Order remitting any punitive damages in excess of $1,250,000 for Mr. Weitzman and any punitive damages in excess of $250,000 for Mr. Braiterman.

This prompted a second appeal by Mr. Fraidin (and the Corporations) to the Court of Special Appeals. That Court, on March 29, 1994, affirmed. (*Jacob Fraidin, et al. v. Andre Weitzman, et al.* Court of Special Appeals, No. 935, September Term, 1993 (unreported)). Petitioners timely filed with the Court of Appeals of Maryland for a petition for a writ of certiorari. That petition was denied on September 14, 1994.

GROUNDS FOR JURISDICTION

Jurisdiction is based on 28 U.S.C. Sec. 1257(a).

STATEMENT OF THE CASE

The background Case was reviewed in the Petition and Supplemental Brief. For a more detailed treatment, see the Statement of the Case in the Petition, beginning at 5.

A $10,000 loan was arranged between Ray Dorman and Margarette Dorman ("the Dormans") and North American Credit Corporation. The loan was brokered by Pacific Mortgage & Investment Group, Ltd. and secured by a mortgage held by North American Credit ("the Corporations"). Both Corporations are managed by Jacob Fraidin ("Fraidin").

After the loan proceeds were paid to the Dormans, they decided it, and the interest charged for it, were improper. In May of 1982, they retained Sheldon H. Braiterman, P.A. ("Braiterman") and Andre R. Weitzman ("Weitzman") to take legal action against Fraidin and the Corporations on the loan.

An action challenging the $10,000 loan was filed. On September 23, 1985, after a three-day trial, the jury returned a verdict against Fraidin and the Corporations of $66,949.86 in compensatory damages and $300,000 in punitive damages. Post-trial motions were denied on November 7, 1985.

Following this verdict, Fraidin wished to settle the matter and believed the Dormans wished to do so. He met with Weitzman and Braiterman on November 1, 1985 and offered to settle the judgment for $100,000 over five years or $60,000 payable immediately. This offer was not accepted and was not communicated by Weitzman to the Dormans.

In mid-November, 1985, there were further contacts about settlement between either Fraidin or Braiterman or Weitzman. On November 25, 1985, Dorman left a message at the office of an attorney for Fraidin that Dorman wanted to settle.

Fraidin requested advice and was informed by his counsel that he could deal directly with the Dormans. On November 27, 1985, Fraidin contacted the Dormans to meet about settlement. The Dormans told Weitzman of this meeting, although Weitzman advised Dorman not to meet with Fraidin if Weitzman was not present.

It appeared the Dormans, dissatisfied with the treatment they had received by Weitzman, had decided to discharge him as their counsel before any meeting between them and Fraidin. In any event, the Dormans arranged to meet Fraidin directly.

On Thanksgiving Day, 1985, Fraidin met with the Dormans to discus settlement. Weitzman was not present. On November 28, 1985, Fraidin met with Mr. Dorman and Weitzman. Several days afterwards, Fraidin met with the Dormans again. Weitzman later appeared and attempted to break up the meeting.

On December 4, 1985, the Dormans sent notice discharging Weitzman and Braiterman. But on December 6, 1985, Weitzman met with Mr. Dorman and obtained a handwritten statement disclaiming that letter and confirming the case had not been settled.

Nevertheless, settlement did occur between Fraidin and the Dormans. On December 9, 1985, the Dormans settled with Fraidin for $50,000. On December 8, Fraidin informed Weitzman that Fraidin and the Dormans were going to settle the next day and told Weitzman that he, Weitzman, could attend. Attorneys for Fraidin or for the Dormans were not present at the settlement. A notice of satisfaction of judgment was filed with the Circuit Court, on December 10, 1985. On December 14, the Dormans again wrote to Weitzman, reaffirming termination of his services.

Weitzman and Braiterman, on December 11, 1985, filed a motion to set aside the order of satisfaction. The Circuit Court

on December 26, 1985, (J. William Hinkel, J.) held an extensive hearing on that motion. All counsel involved were present. Ms. Dorman testified the settlement was voluntary and that they were satisfied with it. On January 10, 1986, Judge Hinkel denied the motion to set aside the order of satisfaction. There was no appeal.

However, on February 13, 1986, Respondents initiated legal action against: the Dormans, Fraidin, the Corporations, and counsel for Fraidin or the Corporations. The Complaint alleged: breach of contract, quantum meruit fee, fraud, conspiracy, and tortious interference with contract.

The second trial which began on September 18, 1990 took up 29 days. The eventual jury verdicts were: on Count I (breach of contract against Dormans): $25,000 plus interest; on Count IV (interference with contract as to Fraidin, the Corporations, and their counsel): no liability as to counsel, but liability as to Fraidin and the Corporations and damages of $183,474.93 plus interest, and on Count V (civil conspiracy as to all defendants): liability as to the Dormans, Fraidin and Corporations, but not as to counsel. No damages were awarded.

Exemplary damages were assessed on Counts IV and V. In a punitive damages proceeding of January 18, 1991, the jury awarded punitive damages against Fraidin and the Corporations of $3,000,000--$2,500,000 for Weitzman, and $500,000 for Braiterman. Post-judgment motions were denied on May 3, 1991. Fraidin and the Corporations appealed.

The Court of Special Appeals in general affirmed the verdict. The sole matter remanded was punitive damages. The Court determined (deciding the question before a recent Court of Appeals opinion on the issue) that sufficient "malice" could be found based on these circumstances. But the Court remanded the punitive damages in light of due process standards described in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991).

(And see *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 88 Md.App. 672, 596 A.2d 687 (1991), *cert.den.*, 326 Md. 435, 605 A.2d 137). It remanded the punitive damages award for the Circuit Court's "reconsideration of granting a remittitur, or if rejected, a new trial."

At the February 25, 1993 hearing on punitive damages, the Circuit Court remarked, "I would be most interested in hearing what the investigator would testify to, but I don't feel it is proper." The Court said, "I do find that in a remittitur hearing I am bound by what occurred at trial, and I am not permitted to go beyond that, so that is what I will limit my finding to, the evidence that was adduced during the very lengthy and interesting trial that we had here... ."(For this and other matters occurring at the remand hearing, see Petition and Appendix, including transcript of the remand hearing beginning at p. 51a).

On Petitioners' appeal from the Circuit Court's actions, the Court of Special Appeals affirmed. That Court stated, "The jury's award of punitive damages was based upon evidence considered by the jury at trial." It continued: "Thus, it would have been inappropriate for the trial court to have granted its remittitur based upon evidence other than that considered by the jury. In short, the trial court complied with our mandate."

REPLY TO RESPONDENTS' BRIEF

While spending precious little time actually responding to the crucial issues raised in the Petition and Supplemental Brief before this Court, Respondents embark on an odious and entirely inappropriate campaign of character assassination and innuendo. Respondents' statements are so far afield of the issues here that their entire Brief in Opposition deserves little attention from this Court and indicates that, indeed, there is no jurisdictional or other impediment to this Court entertaining the issues raised here.

Respondents state (see Brief in Opposition at 9-10) that

Petitioner has a "well deserved reputation for dishonesty." Respondents then proceed to quote liberally from a Court of Special Appeals opinion issued *five years ago*, and which has nothing whatsoever to do with this present case.

Then, rather than address themselves to the critical issue of whether, on remand or later proceeding relating to punitive damages, a Court or jury--consistent with due process requirements--should consider changes in a defendant's financial position occurring since the original trial, or rather than discuss authorities bearing upon that issue, Respondents offer various quotes about Petitioner in an opinion from the United States Court of Appeals for the Fourth Circuit. (Respondent's Brief at 10-11). Yet that Opinion has nothing at all to do with this case.

Then Respondents continue their crusade of character assassination and by noting "secret payments" and other matters that, again, have no bearing on the issues. Following this, they merely recite that the Court of Special Appeals, in its review of the financial matters here, concluded the issue of Petitioner's net worth "was a matter for the jury." (Respondents' Brief at 12-13). But that statement begs the question regarding the present issues.

Petitioner did not have a "full and fair opportunity" to present evidence of his net worth to the jury. Nor did he rely on "fabricated" documents in doing so. Nor, more directly, do these present issues involve the nature of the evidence of net worth at the original trial. The question here is whether changes in financial circumstances are to be considered, and in the larger sense, whether there was sufficient malice under the prevailing view of Maryland law to support the punitive damages award.

Respondents completely miss the point by then arguing that the Maryland practice of remittitur complies with due process. Certainly Petitioner consistently contended that a trial rather than a hearing should have been conducted on remand. But

that is not the same as challenging remittitur as a procedure.

And whether upon remand, Petitioner was entitled to a new evidentiary hearing indeed is among the issues raised here. But Respondents' bald statement denying Petitioner was so entitled does little to advance the issue. Certainly Respondents do not believe Petitioner was entitled to a new evidentiary hearing--or anything else. But that view is hardly dispositive.

The interaction between these parties clearly has been contentious. Years of court proceedings over the scenario which generated the Respondents' litigation have shown that. But that situation does not mean that certiorari should not be granted here.

Petitioner has not contended that due process requires a precise ratio between compensatory and punitive damages. (Respondents' Brief at 17). Due process, however, does demand justice in this regard, and justice was not done in the original punitive damages award--overturned on appeal--or the proceeding in the Circuit on remand.

Petitioner states that the facts do not justify a "substantial award" of punitive damages. If anything, the recent Court of Appeals decision of *Alexander & Alexander v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635, 650 A.2d 260 (1994) ("Alexander"), holds otherwise. In a circumstance much more egregious than the scenario here, that Court *did not find the requisite malice for recovery on a cause of action of tortious inference with contract or with business relationship, and thus did not find the requisite malice for punitive damages recovery.* The *Alexander* court did not even reach due process issues relating to punitive damages. (See fn. 25 at Supp.App. 31a--for a discussion of these issues as they relate to the present matter, see originally-filed Petition). Thus, that Court overturned a punitive damage award *totalling $5,000,000.*

An essential part of Petitioners' argument on punitive

damages was whether Petitioner's conduct was sufficient for a of liability and even if so, whether "malice" existed sufficient for a punitive damage award. These issues were present at the original trial of this matter, in the appeal from that trial, at the remand proceeding, and in the appeal from that remand proceeding--which resulted in the present Petition here.

As Petitioner stated in his Supplemental Brief, even if there was room for debate on those issues in the prior stages of this matter, *Alexander* has settled the issue in Petitioner's favor. Petitioner's conduct did not constitute the "malice" necessary for recovery and, even if so or even if recovery was available on another cause of action, the conduct was not accompanied by the "malice" necessary for a punitive damages award. (For discussion of that decision and its impact on this matter, see Supplemental Brief. The decision is reproduced as an Appendix to that Brief).

The Court of Appeals stated even "purposeful interference with business relationships" may be considered "an integral part of commercial competition" and thus not be considered wrongful with respect to such tort actions. And the Court added, *"we have made it clear in our cases that acting to pursue one's own business interests at the expense of others is not, in itself, tortious."* [Emphasis supplied].

When it is evident that the interference claim does not involve any illegal acts, the plaintiff carries "a heavy burden in trying to establish the interference tort through proof of actual malice." In addition, *"acts of interference with economic relations do not become tortious simply because the defendant carries them out with a wrongful intent."* Thus, even "animosity" is not sufficient to sustain the tort if the actor's conduct "was incidental to its pursuit of legitimate commercial goals."

The entire settlement was approved by the Circuit Court in an open proceeding on Respondents' motion to set aside the

notice of satisfaction of judgment. That Court, based in part on testimony from Ms. Dorman that the Dormans freely entered into the settlement, ruled the settlement was voluntary and refused to set it aside. Respondents did not appeal. Thus, their various characterizations of Fraidin's alleged conduct as to the settlement scenario (see e.g., Respondent's Brief at 4-5) are not relevant.

Petitioner does not "misread" *Alexander*. (Respondents' Brief at 19-20). Petitioner in his Supplemental Brief engaged in a comprehensive discussion of that case and the basis for its decision. Respondents have chosen not to detail or to describe how Petitioner has "misread" that case, nor have they managed to explain just how *Alexander* not significant here.

Respondents finally, in a last-ditch effort to avoid a consideration by this Court of substantive due process and other issues dealing with punitive damages, simply state that there is "no issue reviewable by this Court" and there is a "lack of any substantive federal issue" in this matter. (Respondents' Brief at 20). Respondents, however, have not discussed any of the cases or authorities noted by Petitioner in his Petition or Supplemental Brief, have not indicated that there is any jurisdictional defect to the Petition, and have not raised any argument preventing review by this Court of very important and persistent due process issues concerning application and award of punitive damages--especially in a remand or later proceeding.

In short, Respondents have not presented this Court with any reason for denying the Petition. Accordingly, Petitioner urges this Court to consider the issues raised here, grant this Petition, and review essential aspects of punitive damages awards.

CONCLUSION

THEREFORE, Petitioner requests of this Court that it GRANT his Petition for a Writ of Certiorari and REVERSE the decision of the Court of Special Appeals of Maryland.

RESPECTFULLY SUBMITTED,

/s/

JACOB FRAIDIN
3406 Fielding Road
Baltimore, Maryland 21208
(410) 484-2520
Pro Se

Supreme Court, U.S.
FILED

NO.

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

JACOB FRAIDIN,

Petitioner,

v.

ANDRE R. WEITZMAN, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITIONER'S SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

JACOB FRAIDIN
3406 Fielding Road
Baltimore, Maryland 21208
(410) 484-2520
PRO SE

Brief Printing Specialists, Inc., 1001 E. Main Street, Suite 210
Richmond, Virginia 23219, (804) 644-0700

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QUESTIONS PRESENTED

[These are the same Questions as presented in Petitioner's originally-filed Petition. Those involved in this Supplement are in italics]

1. At either a new hearing or new trial concerning punitive damages on remand, is additional relevant evidence regarding the net worth of a defendant admissible, particularly if there has been a change in defendants' financial condition since the original damage award?

2. *Did the punitive damages figure entered at the remand hearing comply with due process requirements and other punitive damages standards, particularly in view the alleged conduct supposedly supporting such damages?*

3. *Was the punitive damages award so excessive as to violate due process?*

PARTIES TO THE PROCEEDING

The parties to the proceeding, including those noted in the caption of this case, are:

Jacob Fraidin, Petitioner,

North American Credit Corporation (a party to the previous matters but not a Petitioner here),

Pacific Mortgage and Investment Corporation (a party to the previous matters but not a Petitioner here),

Andre Weitzman, Respondent, and

Sheldon Braiterman, Respondent.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

JACOB FRAIDIN,

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v.

ANDRE R. WEITZMAN, et al.,

Respondents

PETITIONER'S SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Jacob Fraidin, proceeding pro se, here submits this Supplement to his Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, ***to alert this Court to a decision by the Court of Appeals of Maryland issued after this Petition was filed and bearing directly upon the issues here.***

OPINION BELOW

This Supplement to the Petition for Writ of Certiorari is based on a crucial and very recent decision bearing upon the questions discussed in this Petition, and issued by the Court of Appeals on December 8, 1994. The Decision was issued after the decisions in the Court of Special Appeals in the present case and after this Petition was on file with this Court.

The case is *Alexander & Alexander Inc. (and Mary D. Scheeler) v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635, 650 A.2d 260 (December 8, 1994). The opinion is set forth in full in the Appendix to this Supplement, beginning at page 1a.

OTHER OPINIONS BELOW

[See previously-filed Petition and Appendix]

The case which is the subject of the original Petition was decided by the Court of Special Appeals on March 29, 1994 (*Jacob Fraidin, et al. v. Andre Weitzman, et al.*, No. 935, September Term, 1993). (The opinion is set forth in full in the Appendix to the previously-filed Petition, beginning at p. 1a). The case involved an appeal from a remand as to punitive damages, following an earlier appeal after jury verdicts against Petitioner in an action alleging tortious interference with contract.

The remand hearing on punitive damages was held in the Circuit Court for Baltimore City on February 25, 1993. At the conclusion of that hearing, the Circuit Court determined that the punitive damages would be reduced by half.

The matter arose from a jury trial in the Circuit Court for Baltimore City on a Complaint by Respondents Andre Weitzman, Esq. and Sheldon Braiterman, Esq. (as Plaintiffs) against Petitioners Jacob Fraidin (Fraidin) and North American Credit Corporation, Pacific Mortgage & Investment Company (the Corporations) (as Defendants) and other Defendants not parties to this Petition. The action involved efforts by Mr. Fraidin, on behalf of himself and the Corporations, to settle a jury verdict against him and those corporations on a claim brought by a husband and wife (through the two attorneys) over alleged irregularities in a mortgage loan. *The attorneys' action alleged tortious interference with contract* and other claims.

The Complaint by Respondent attorneys was filed February 13, 1986. (The first trial ended in a mistrial). Trial began on September 18, 1990. Petitioners, on December 20, 1990, were assessed compensatory damages of $183,474.93. The jury found punitive damages could be assessed. In a later punitive damages proceeding, the jury on January 18, 1991 assessed

punitive damages against Petitioners of $3 million--$2.5 million for Mr. Weitzman and $500,000 for Mr. Braiterman.

On May 3, 1991, the Circuit Court denied post-judgment motions. Defendants appealed to the Court of Special Appeals of Maryland.

On August 9, 1991, while the appeal was pending, Mr. Fraidin filed for bankruptcy. The Court of Special Appeals, on August 19, 1991, stayed further proceedings. On September 26, 1991 relief from automatic stay was granted by the Bankruptcy Court. On October 15, 1991, the Court of Special Appeals ordered that the appeal and other matters shall proceed.

On September 4, 1992, the Court of Special Appeals issued its opinion in *Fraidin v. Weitzman*, 93 Md.App. 168, 611 A.2d 1046 (1992). Numerous issues were reviewed which are not part of the Petition or this Supplement to the Petition. The Court of Special Appeals affirmed the verdict as to liability and as to compensatory damages. (See Appendix to original Petition.)

However, Court of Special Appeals remanded the punitive damages award. The Court determined due process requirements were not met in the award, which, as the Court remarked, equalled Mr. Fraidin's net worth even by the most generous view of the evidence at the time of trial.

The Court of Special Appeals' mandate in the earlier appeal was issued October 5, 1992. Petitioners submitted to the Court of Appeals of Maryland a petition for a writ of certiorari on other issues the matter. This was denied on January 14, 1993.

On remand as to punitive damages, the Circuit Court (Hon. Thomas E. Noel, J.) did not conduct a new trial. Instead, on February 25, 1993, it conducted a hearing at which it declined to consider certain new evidence--that is, the fact that Mr. Fraidin had in the interim filed for bankruptcy, which did not exist at the time of the jury's January 18, 1991 punitive damages award.

The Circuit Court decided the punitive damages award would be reduced by half. It issued an Order remitting any punitive damages in excess of $1,250,000 for Mr. Weitzman and any punitive damages in excess of $250,000 for Mr. Braiterman.

This prompted a second appeal by Mr. Fraidin (and the Corporations) to the Court of Special Appeals as to the remand proceeding. The Court of Special Appeals, on March 29, 1994, affirmed the Circuit Court. (*Jacob Fraidin, et al. v. Andre Weitzman, et al.* Court of Special Appeals, No. 935, September Term, 1993 (unreported)).

The Court of Special Appeals mandate was issued April 28, 1994. Petitioners applied to the Court of Appeals of Maryland for a writ of certiorari. That petition was denied by the Court of Appeals on September 14, 1994.

Subsequently, on December 8, 1994, the Court of Appeals decided *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635, 650 A.2d 260 (1994).

GROUNDS FOR JURISDICTION

The Court of Special Appeals issued its opinion on March 29, 1994. On September 14, 1994, the Court of Appeals denied Petitioner's timely submitted a petition for a writ of certiorari. This original Petition before this Court was filed within 90 days of the September 14, 1994 denial by the Court of Appeals of the petition to that Court for a writ of certiorari.

The jurisdiction is based on 28 U.S.C. Sec. 1257(a).

STATUTES OR PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment states: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Statement of the Case was reviewed in the previously-filed Petition and is recited in general here. For a more detailed treatment, see the Statement of the Case in the previously-filed Petition, beginning at p. 5.

A. Statement of Material Facts

1. Previous Action Challenging Loan

The scenario began with a $10,000 loan arranged between Ray Dorman and Margarette Dorman ("the Dormans") and North American Credit Corporation. The loan was brokered by Pacific Mortgage & Investment Group, Ltd. and secured by a mortgage held by North American Credit ("the Corporations"). Both Corporations are managed by Jacob Fraidin ("Fraidin").

After the loan was paid, the Dormans decided it, and the interest charged for it, were improper. In May of 1982, they retained Sheldon H. Braiterman, P.A. ("Braiterman") and Andre R. Weitzman ("Weitzman") to take legal action on their behalf against Fraidin and the Corporations concerning the loan. At that time, Weitzman was part of Braiterman's law firm, Braiterman & Johnson, P.A. The Dormans executed a power of attorney and contingent fee arrangement ("the Contract").

Mr. Weitzman started his own firm in April, 1985. A new contract, dated April 10, 1985, was arranged between Weitzman and the Dormans.

An action challenging the $10,000 loan was filed on behalf of the Dormans against Fraidin and the Corporations. On September 23, 1985, after a three-day trial, the jury returned a verdict against Fraidin and the Corporations of $66,949.86 in compensatory damages and $300,000 in punitive damages. Post-trial motions were denied on November 7, 1985.

2. Fraidin's Settlement with Dormans of Judgment

Following this verdict, Fraidin wished to settle the matter

and believed the Dormans wished to do so. Fraidin (without attorney Weinstock) met with Weitzman and Braiterman on November 1, 1985 and offered to settle the judgment for $100,000 over five years or $60,000 payable immediately. This offer was not accepted and was not communicated by Weitzman to the Dormans.

On November 12, 1985, Fraidin hired Gordon, Feinblatt, Rothman, Hoffberger & Hollander for post-judgment matters. Lawrence D. Coppel of that firm reviewed the case and met with Fraidin. Weinstock continued to be involved as counsel.

In mid-November, 1985, there were further contacts about settlement or other matters between either Fraidin or Weinstock and Braiterman or Weitzman. Eventually, there was direct contact concerning settlement between Fraidin and the Dormans. On November 25, 1985, Dorman left a message at Weinstock's office that he wanted to settle. Weinstock told Fraidin and Weitzman about this call. Fraidin requested advice and was informed by Weinstock and by Coppel that he could deal directly with the Dormans.

On November 27, 1985, Fraidin contacted the Dormans to meet about settlement. The Dormans told Weitzman of this meeting, although Weitzman advised Dorman not to meet with Fraidin if Weitzman was not present.

It appeared the Dormans, dissatisfied with the treatment they had received by Weitzman, had decided to discharge him as their counsel before any meeting between them and Fraidin--although this remains disputed by Respondents. In any event, the Dormans arranged to meet Fraidin directly.

On Thanksgiving Day, 1985, Fraidin met with the Dormans and discussed settlement. Weitzman was not present. On November 28, 1985, Fraidin met with Mr. Dorman and Weitzman. That meeting did not produce a settlement. Several

days afterwards, Fraidin met with the Dormans again. Weitzman, initially, was not present at first, but he did appear and attempted to break up the meeting.

On December 4, 1985, the Dorman sent notice discharging Weitzman and Braiterman. On December 6, 1985, Weitzman met with Mr. Dorman and obtained a handwritten statement disclaiming that letter and confirming the case had not been settled.

Nevertheless, settlement did occur between Fraidin and the Dormans directly. *On December 9, 1985, the Dormans settled with Fraidin for $50,000 cash.* On December 8, Fraidin informed Weitzman that Fraidin and the Dormans were going to settle the next day and told Weitzman that he, Weitzman, was welcome to attend. Attorneys for Mr. Fraidin or for the Dormans were not present at this settlement.

A notice of satisfaction of judgment was filed with the court, on December 10, 1985. The Dormans reaffirmed their December 4 written discharge of Weitzman and Braiterman.

3. Challenge by Dormans' Former Counsel to Settlement

Upon learning of the settlement, Weitzman and Braiterman, on December 11, 1985, filed a motion to set aside the order of satisfaction. On December 14, 1985, the Dormans wrote to Weitzman, reaffirming their termination of his services.

The Circuit Court (J. William Hinkel, J.) held a hearing on the motion to set aside the settlement on December 26, 1985 (J. William Hinkel, J.). The hearing was extensive. All counsel involved were present. Ms. Dorman testified the settlement was voluntary and that they were satisfied with it.

On January 10, 1986, Judge Hinkel denied the motion by the attorneys to set aside the order of satisfaction. There was no appeal. This should have ended the matter.

4. Underlying Action by Weitzman/Braiterman Against Fraidin, et al.

However, on February 13, 1986, Weitzman along with Braiterman and Johnson, P.A. initiated legal action in the Circuit Court for Baltimore City against: the Dormans, Fraidin, the Corporations (that is, Pacific and North American Credit), Weinstock and his firm, and Coppel and his firm. The multi-count Complaint alleged: breach of contract, quantum meruit fee, fraud, conspiracy, and tortious interference with contract. The Complaint sought compensatory and punitive damages.

Trial did not commence until January, 1990. That trial ended in a mistrial.

A second trial began on September 18, 1990 and would take up 29 days. The eventual result was in favor of the Plaintiff attorneys. The jury verdicts were:

on Count I (breach of contract against Dormans): $25,000 (one half of the settlement figure arrived at between Fraidin and the Dormans--$12,500 to each Plaintiff), plus interest;

on Count IV (interference with contract as to Fraidin, the Corporations, and their counsel): no liability as to counsel, but liability as to Fraidin and the Corporations and damages of $183,474.93 (one half of the award in the original suit--$91,737.47 for each Plaintiff), plus interest, and

on Count V (civil conspiracy as to all defendants): liability as to the Dormans, Fraidin and Corporations, but not as to their counsel. However, no damages were awarded.

Exemplary damages were assessed on Counts IV (interference with contract) and V (civil conspiracy). In the later punitive damages proceeding of January 18, 1991, the jury awarded punitive damages against Fraidin and the Corporations totalling $3,000,000--$2,500,000 for Weitzman, and $500,000 for Braiterman.

Post-judgment motions were denied on May 3, 1991. Fraidin and the Corporations then appealed to the Court of Special Appeals, raising various issues regarding the trial.

5. Appeal, Remand on Punitive Damages

The Court of Special Appeals opinion involved considerable discussion of several issues. The bulk of this discussion is not relevant to the Petition or to this Supplement and need not be recited here. See *Fraidin v. Weitzman*, 93 Md.App. 168, 611 A.2d 1046 (1992) (Bishop, J.), *cert.den.*, 329 Md. 109, 617 A.2d 1055.

In general, the verdict was affirmed. The sole matter remanded to the Circuit Court was the punitive damages.

On that issue, *Fraidin disputed the conclusion that the evidence was sufficient to support a finding of malice by him against Weitzman and Braiterman.* Fraidin noted that, as to any continuing contract between the Dormans and Weitzman or Braiterman, there was evidence the Dormans already were dissatisfied with Weitzman and Braiterman before they ever met with Fraidin, and that they had discharged the attorneys before any contact or meeting with Fraidin.

Petitioners thus contended that, at the time of the settlement discussions between Fraidin and the Dormans, there was no attorney-client relationship from which any malice could be inferred by Fraidin against Respondent attorneys. Fraidin's interest was simply to see if the Dormans would settle. This situation clearly affects the matter of Fraidin's "malice."

The Court of Special Appeals determined (deciding the question before *Alexander*) that sufficient "malice" in the legal sense could be found based on these circumstances. But the Court remanded the punitive damages matter in light of due process standards described by this Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). (For a further

discussion in Maryland as to these standards, see *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 88 Md.App. 672, 596 A.2d 687 (1991), *cert.den.*, 326 Md. 435, 605 A.2d 137--a precursor to the *Alexander* decision which is the subject of this Supplement.

As to due process standards, the Court of Special Appeals found that any punitive damages award meeting due process requirements *must relate to the defendant's ability to pay*. It then proceeded to discuss that question (see discussion in previously-filed Petition).

The Court of Special Appeals remanded the punitive damages award to the Circuit Court "for its reconsideration of granting a remittitur, or if rejected, a new trial." The Court then discussed other various issues not involved in this present appeal (see 93 Md.App. 218-239).

6. Punitive Damages Proceeding on Remand

At the February 25, 1993 hearing on punitive damages, Fraidin maintained that, consistent with the remand directive, a new trial on punitive damages was appropriate. And any new trial or any other remand proceeding on the issue must consider any additional evidence concerning the defendant's financial status in order to determine any appropriate punitive damages award.

Weitzman and Braiterman contended no new evidence could be introduced because the proceedings were in the nature of a motion for remittitur. Petitioners submitted a request for remittitur along with other post-trial request for relief (new trial, etc.) after the jury verdict in the original trial. But no such motion was pending at the time of the February 25, 1993 proceeding.

At the February 25 remand proceeding, Fraidin reminded the Court that his bankruptcy was still active. He stated the Bankruptcy Examiner was in Court and was prepared to testify

as to Fraidin's financial condition, with documentation.

The Circuit Court stated it would not hear additional evidence and remarked, "I would be most interested in hearing what the investigator would testify to, but I don't feel it is proper." The Court added, "I do find that in a remittitur hearing I am bound by what occurred at trial, and I am not permitted to go beyond that, so that is what I will limit my finding to, the evidence that was adduced during the very lengthy and interesting trial that we had here... ."

The Court ruled (as for this and other matters occurring at the remand hearing, see references previously-filed Petition and Appendix, including transcript of the remand hearing in the Appendix to the Petition beginning at p. 51a). The Court's discussion in its ruling included the comment, "I differ from [Plaintiffs's suggestion] that the degree of malice should be considered as a factor in determining the amount in order to be remitted. * * *"

The Circuit Court then determined the punitive damages against the Petitioner/Defendants (Fraidin and Corporations) would be reduced by half. It assessed punitive damages at $1,500,000 on behalf of Plaintiff/Respondent Weitzman and $250,000 on behalf of Plaintiff/Respondent Braiterman. An Order to that effect was issued on February 25, 1993.

B. Decision by the Court of Special Appeals

On Petitioners' appeal from the remand proceeding on punitive damages, the Court of Special Appeals affirmed the Circuit Court. (*Fraidin v. Weitzman*, Court of Special Appeals, No. 935, March 29, 1994, September Term, 1993 (unreported) [See Appendix to previously-filed Petition at p. 1a].

The Court stated, "The jury's award of punitive damages was based upon evidence considered by the jury at trial." The Court then continued: "Thus, it would have been inappropriate

for the trial court to have granted its remittitur based upon evidence other than that considered by the jury. In short, the trial court complied with our mandate. There was no error."

The Court decided the award was not excessive. It stated: "[W]e shall not entertain Fraidin's argument that the award was excessive because it is not proportionate to his reprehensible conduct. We made it clear in *Fraidin I* that, although the award was quite high, it violated due process only because it consumed Fraidin's entire net worth."

As to the proceeding itself, the Court stated, "We have recognized that 'the granting or refusal of a remittitur is largely within the discretion of the trial judge.'" The Court said, "On remand, we expressly directed the trial court to reconsider Fraidin's motion for remittitur on this basis."

The Court thus found that the amount of the remittitur should be based on the same abuse of discretion standard. And the Court of Special Appeals found no abuse of discretion in the Circuit Court's treatment of the issues in the remand proceeding or in its remittitur. It thus affirmed the Circuit Court.

Petitioner and the Corporations applied to the Court of Appeals for a writ of certiorari. This petition was denied on September 14, 1994.

HOWEVER, the Court of Appeals, just weeks later, decided *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates, Inc.*, No. 53, September Term, 1993, decided December 8, 1994.

SUPPLEMENTAL REASONS FOR GRANTING WRIT

The Supplemental Reasons concern Question No. 2 and Question No. 3 of the Questions Presented in the previously-filed Petition (repeated in this Supplement):

2. Did the punitive damages figure entered at the remand hearing in this matter comply with due process requirements, especially in view of the conduct supposedly supporting such damages?

3. Was the punitive damage award so excessive as to violate due process?

[For discussion of other issues in
Reasons for Granting Writ,
see original Petition, beginning at p. 18]

I. AS NOW ESTABLISHED IN MARYLAND LAW, PETITIONER'S CONDUCT DID NOT GIVE RISE TO LIABILITY FOR TORTIOUS INTERFERENCE WITH CONTRACT, AND, IF SO, THIS CONDUCT DOES NOT CONSTITUTE MALICE SUFFICIENT FOR A PUNITIVE DAMAGES AWARD ON ANY CAUSE OF ACTION IN RESPONDENTS' COMPLAINT.

Following the Court of Appeals decision issued after this Petition was filed, the punitive damages assessed against Petitioner at trial, reassessed at the remand proceeding following the original appeal, and then affirmed by the Court of Special Appeals in the appeal following the remand proceeding, cannot be sustained. To do so now would be a miscarriage of justice. This Court is in a unique position to review the punitive damages award and to grant appropriate relief.

The Court of Appeals' recent decision in *Alexander & Alexander v. B. Dixon Evander & Associates, Inc.*, 336 Md. 635, 650 A.2d 260 (1994) ("Alexander"), drastically alters the situation regarding the liability supposedly attaching to Petitioner's actions and clearly affects the punitive damages discussion here. In *Alexander*, considering a situation much more egregious than the present instance, the Court of Appeals *did not find the requisite malice for recovery on a cause of action of tortious inference with contract or with business relationship, and thus did not find the requisite malice for recovery of punitive damages.*

Indeed, the Court of Appeals in *Alexander* did not even reach due process issues relating to punitive damages. (See fn. 25 at Supp.App. 31a--for a discussion of these issues as they relate to the present matter, see originally-filed Petition). Thus, the Court of Appeals overturned a punitive damage award *totalling $5,000,000.*

It is simply a matter of timing that the Court of Appeals issued its *Alexander* decision after denying certiorari in this present case. Had this decision been issued mere weeks earlier, the Court of Special Appeals would have had to consider it in its review of Petitioner's appeal from the remand proceeding. And even if the Court of Special Appeals' decision would have been the same, had *Alexander* already been issued by that point, the Court of Appeals would have found it necessary to grant certiorari in order to correct such a decision.

Crucial to Petitioners' argument throughout the discussion of punitive damages was whether Petitioner's conduct was sufficient to require a finding of liability and even if so, whether "malice" could be found based on this conduct sufficient for a punitive damage award. These issues were present not only at the

original trial of this matter but in the appeal from that trial, at the remand proceeding, and in the appeal from that remand proceeding--which resulted in the present Petition here.

Even if there was room for debate on those issues in the prior stages of this matter, *Alexander* has settled the issue in Petitioner's favor. Petitioner's conduct did not constitute the "malice" necessary for recovery and, even if so or even if recovery was available on another cause of action, the conduct involved was not accompanied by the "malice" necessary for an award of punitive damages in any event.

Alexander, reviewed a complex series of negotiations concerning a hospital system and its insurance broker. Medical malpractice insurance is an extensive industry and the insurance premiums can be large--commissions on those premiums can likewise be extremely significant to any insurance broker.

Plaintiff Evander had been the hospital system's broker for years. However, the hospital undertook a reconsideration of its insurance situation and chose a new broker. But it also arranged broker for a renewal of a certain aspect of its malpractice policy arranged by the prior broker. The hospital's contract with the new broker was for a flat fee for services, without commissions.

However, Evander had expected a commission on that aspect of the policy which the hospital had renewed (the commission was in excess of $250,000). There was later to be considerable dispute on whether that commission was due. Nevertheless, due to the negotiations between the hospital and the new insurance broker and the contract arranged between these parties, no commission was paid to Evander.

Evander sued for this commission and contended that the conduct between the hospital, the new broker, its subsidiary, and other individuals constituted civil conspiracy and tortious

interference. He thus presented those, among other, claims. There was dispute at trial as to various aspects of the alleged conduct and whether it constituted sufficient malice for recovery on the causes of action, or a basis for punitive damage award.

The verdict in the original trial was in favor of Evander. Compensatory damages were awarded. In addition, the jury awarded *punitive damage* awards of *$40,000,000* against the broker, *more than $250,000* against one of the individuals involved (Scheeler) and *$70,104.15* against other defendants. The trial court reduced the punitive damage award against the broker to $12,500,000. (See Supp.App. 10a).

On appeal, the Court of Special Appeals reversed and remanded on punitive damages issue, in light of due process standards and other considerations. See *Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 88 Md.App. 672, 596 A.2d 687 (1991), *cert.den.*, 326 Md. 435, 605 A.2d 137 (the Court of Appeals at that time denied certiorari).

After an extensive 29-day jury trial on remand as to punitive damages, the jury awarded $4,000,000 in punitive damages against the new broker and $1,000,000 in punitive damages against one of the individuals involved (Scheeler). On appeal from this punitive damages verdict, the Court of Appeals immediately granted writs of certiorari filed by both sides, prior to any determination by the Court of Special Appeals.

The Court of Appeals then *reversed*. In a wide-ranging discussion on the nature of the causes of action for civil conspiracy and tortious interference with contract or with business relationship, the *Alexander* court found that there was an insufficient showing of "malice" to recover on the tortious interference cause of action *or* to award punitive damages.

The Court noted [Supp.App. 18a]:

> [T]his case does not involve an alleged wrongful interference with a specific, discrete contract between Evander and Shand but interference with an ongoing business relationship that included Evander's entitlement to a commission upon the hospital's exercise of the OEP option. This case thus implicates the broader form of the tort, namely malicious or wrongful interference with economic relationships.

The Court indicated, however, that even the more specific form of the tort (interference with contract) involves some showing that the alleged conduct was engaged in with malice.

The Court of Appeals stated the law permits "aggressive" efforts by "[p]articipants in the economic marketplace." Even "purposeful interference with business relationships" may be considered "an integral part of commercial competition" and thus not be considered wrongful with respect to such tort actions. (And see discussions at fns. 15-18).

Therefore, the Court added, *"we have made it clear in our cases that acting to pursue one's own business interests at the expense of others is not, in itself, tortious."* [Emphasis supplied]. And further, *"this Court has refused to adopt any theory of tortious interference with contract or with economic relations that 'converts a breach of contract into an intentional tort.'"* (Supp.App. at 21a). [Emphasis supplied].

The Court of Appeals observed that the law should carefully consider allowing the natural conduct of actors in the economic marketplace to serve as the basis for tort actions, particularly in view of the additional recovery available in tort actions of this nature, including punitive damages. Thus, the Court stated, the tort does not lie "whenever an intentional breach of contract would forseeably impinge upon a contracting party's economic relations with others." (Supp.App. at 23a). And the

Court stated [citation reference omitted, emphasis supplied] (Supp.App. at 24a):

> [T]ortious intent alone, defined as an intent 'to harm the plaintiff or to benefit the defendant at the expense of the plaintiff,' [is] not sufficient to turn deliberate interference into a tort, but that the defendant must interfere through improper or wrongful means.
>
> Therefore, wrongful or malicious interference with economic relations is interference by conduct that is independently wrongful or unlawful, quite apart from its effect on the plaintiff's business relationships.
>
> * * *
>
> In addition, 'actual malice,' in the sense of ill will, hatred or spite, may be sufficient to make an act of interference wrongful *where the defendant's malice is the primary factor that motivates the interference.*

When it is evident that the interference claim does not involve any illegal acts, the plaintiff carrys "a heavy burden in trying to establish the interference tort through proof of actual malice." In addition, "*acts of interference with economic relations do not become tortious simply because the defendant carries them out with a wrongful intent.*" Thus, even proof of "animosity" is not sufficient to sustain the tort if the actor's conduct "was incidental to its pursuit of legitimate commercial goals." (Supp.App. 26a, emphasis supplied).

The Court of Appeals then determined, reviewing the scenario before it, that the various Defendants were acting within the context of legitimate commercial goals. And even assuming

that ill will or spite was involved, Plaintiff Evander "utterly failed to prove such ill will or spite."

Much of the Plaintiff's claim in that regard concerned an alleged statement made to another about Plaintiff by Defendant Scheeler, and the Court of Appeals found that the requisite level of proof regarding this statement was not present in the record. (See discussion at Supp.App. 28a-31a and fns. 22 and 24). The Court found evidence of this statement was properly excluded.

With this statement excluded, there was insufficient additional evidence of malice in the Defendants' conduct to sustain the tort or, for that matter, to award punitive damages. The punitive damages in the second trial were awarded because the trial court had instructed the jury that the conduct did involve malice. But the *Alexander* Court concluded this instruction was incorrect given its view of the issues. "Thus, at both trials, [plaintiff] Evander failed to offer sufficient admissible evidence of actual malice for this issue to have been submitted to either jury."

Therefore, the Court concluded (Supp.App. 31a):

> Evander failed to establish that the defendants' interference with economic relations was wrongful or malicious, and thus failed to prove the existence of tortious conduct. Moreover, even if we were to assume arguendo the existence of tortious conduct, Evander failed to establish the requisite actual malice to support an award of punitive damages.

The $5,000,000 total punitive damage awards were reversed. Judgments in favor of the Defendants were to be entered.

The Court of Appeals, in its review of the causes of action which were involved in this present matter and its sweeping re-evaluation of the level of malice required to sustain

such a cause of action, **essentially has obviated any finding of liability against Petitioner**, which was based in large part on Respondents' tortious interference claim. And the Court clearly has concluded that under the view of Maryland law on these issues, any punitive damage award against Petitioner in the present circumstances would be improper.

As Petitioner also attempted to emphasize in the punitive damages remand proceeding, the evidence showed that he simply was seeking to settle certain litigation. The evidence showed the Dormans were dissatisfied with Respondent Weitzman's representation of them and had discharged them as their counsel. Weitzman then sought on his own to reverse this action by the Dormans.

The evidence showed that Fraidin had consulted with counsel to ensure the propriety of any direct contact between him and the Dormans without any counsel that may still be representing the Dormans. He contacted Weitzman about these meetings. He never evidenced any malice toward Weitzman or toward Respondent Braiterman.

The entire settlement was approved by the Circuit Court in an open proceeding based on the motion of Weitzman and Braiterman to set aside the notice of satisfaction of judgment. The Circuit Court, based in part on testimony from Ms. Dorman that they Dormans had freely entered into the settlement, found that the settlement was voluntary and refused to set it aside. Obviously, no malice or improper conduct can be inferred from an arrangement which produces such a ruling by a Court based on the evidence surrounding those negotiations.

Further, even if the later action by Respondents against Petitioner--which is the source of all further litigation in this matter including the present Petition--was proper, Fraidin was simply acting in his own "commercial interest" in seeking

settlement of the litigation. And, as the Court of Appeals determined in *Alexander*, *even if there was any improper motive* in Petitioner's conduct, this is *not* sufficient to sustain the tort action--or to demonstrate malice permitting a punitive damage award--if the conduct involves legitimate commercial or business goals. Even "aggressive" conduct in this regard will not be punished by the law.

There was no evidence that Fraidin acted with the requisite malice to sustain this cause of action. Under the standards restated and emphasized by *Alexander* and considering conduct in that case in which an insurance broker was essentially deprived of more than $200,000 in commissions, the Court of Appeals found *no "malice" sufficient to permit recovery on the causes of action.*

Beyond this, there was no "malice" sufficient to permit recovery of the punitive damages. Thus, punitive damages in *Alexander* which originally were more than $40,000,000 against one Defendant, reduced by the trial court to $12,500,000, and then which became $4,000,000 in the remand punitive damages proceeding following the initial appeal--became zero.

Under this discussion, the conduct in the present matter cannot possibly reach even the level of liability. No evidence could be adduced then or now to attach the level of malice which now must be shown to permit recovery on tortious inference matters. And even if there could be recovery on civil conspiracy, there must still be "malice" for recovery of punitive damages. As *Alexander* now has shown, in these types of scenarios, such malice requires a strong showing that does not exist here.

Therefore, *in view of this very recent declaration by the Court of Appeals on issues and standards dealing with the Questions Presented in this Petition*, Petitioner urges this Court to grant the Petition to review the Court of Special Appeals

actions here. Upon that review, and given the standards as now operate in the Maryland law on these issues, Petitioner contends that the Court of Special Appeals' decision affirming the Circuit Court's actions in the punitive damages remand proceeding must be reversed.

II. THE PUNITIVE DAMAGE AWARD WAS EXCESSIVE IN VIEW OF THE FACT THAT PETITIONER'S CONDUCT DID NOT GIVE RISE TO LIABILITY

And, as Petitioner stated in his original Petition, the $1.5 million punitive damages award violated due process standards. Several factors are involved for compliance with the concepts of due process in a particular punitive damage award, such as:

--the relationship between such damages and the harm likely to result as well as the harm which occurred,

--*the degree of reprehensibility of the conduct*,

--the existence or frequency of similar past conduct,

--the profitability to the defendant of the conduct, and

--the defendant's financial position,

No less important considerations are that punitive damages are an "extraordinary sanction" to be awarded in egregious cases. They may be imposed only where there is "outrageous conduct." Their purpose is not to reward the plaintiff.

Here, the supposed "reprehensible" conduct was attempts by Fraidin to settle a lawsuit without participation of attorneys for the plaintiffs, in which there was a genuine dispute over whether the attorneys already had been discharged by the plaintiffs. The evidence at trial showed that the Dormans, more than once, reaffirmed their discharge of Weitzman and Braiterman. In the hearing to set aside the settlement, Ms. Dorman testified they were not coerced into it by Fraidin. The settlement was confirmed by that court. The supposed

"outrageous" and "egregious" conduct, or its "degree of reprehensibility" must be viewed in this context.

There was no evidence of any past conduct by Fraidin of this sort or of the likelihood of any future such conduct. The "profitability" to Mr. Fraidin of the conduct was before the jury. Further, this act did not result in severe personal injury, death, harm to reputation, or permanent environmental pollution.

Neither the Circuit Court nor the Court of Special Appeals in reviewing this case had the recent decision of *Alexander* to guide its determination of the issues. But as is clearly the case now, the standards as expressed in *Alexander* would result in a finding of no recovery on the basic causes of action, and even if liability were found as to any cause of action not requiring a showing of "malice," would result in a finding of no award of punitive damages.

As Petitioner has stated, the Circuit Court's review of the punitive damages award on remand did not properly consider these factors. The Court did not even review whether there was sufficient evidence to support the punitive damages award. Such an award was a manifest injustice, which the Circuit Court had a duty to prevent, even after affirmance of the underlying verdict on appeal.

Refusal by the Circuit Court to order a retrial of punitive damages, to admit additional evidence, to examine the background, or to support its decision as to a $1.5 million award, was error or abuse of discretion. The Court of Special Appeals erred in affirming not only the manner in which the remand proceedings were conducted but also the punitive damages award itself.

The issues which prompted the remand, and the treatment of those issues in the remand proceeding, should command the attention of this Court.

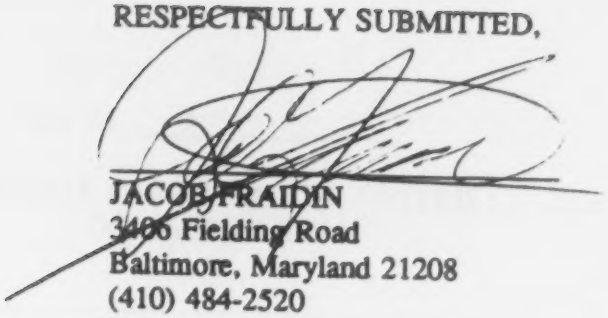
Standards as to malice and punitive damages in cases involving tortious interference with contract or with business relationship, as now declared by *Alexander*, directly affect the issues here. Petitioner urges this Court to consider this Supplement to his Petition.

Given the view of these issues as expressed by *Alexander*, approval of the punitive damages award here would be a miscarriage of justice.

CONCLUSION

THEREFORE, Petitioner request of this Court that it GRANT his Petition for a Writ of Certiorari and REVERSE the decision of the Court of Special Appeals of Maryland.

RESPECTFULLY SUBMITTED,



JACOB FRAIDIN
3406 Fielding Road
Baltimore, Maryland 21208
(410) 484-2520
Pro Se

No. 94-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

JACOB FRAIDIN,

Petitioner,

v.

ANDRE R. WEITZMAN, et al.,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF SPECIAL APPEALS OF MARYLAND

APPENDIX TO
PETITIONER'S SUPPLEMENT TO
PETITION FOR A WRIT OF CERTIORARI

IN THE COURT OF APPEALS OF MARYLAND

No. 53

September Term, 1993

ALEXANDER & ALEXANDER INC. and
MARY D. SCHEELER

v.

B. DIXON EVANDER & ASSOCIATES, INC.

Murphy, C.J.
Eldridge
Rodowsky
Chasanow
Bell
Raker
*Orth, Charles E., Jr.
(Retired, specially assigned),

JJ.

Opinion by Eldridge, J.

Filed: December 8. 1994

* Orth, J., retired, and specially assigned, participated in the hearing and conference, but died prior to the filing of the opinion.

This case involves a challenge to awards of punitive damages against Alexander & Alexander, an insurance broker, and against Mary Scheeler, one of its vice presidents. A jury awarded the punitive damages under a count alleging tortious interference with a contractual arrangement concerning insurance commissions. The jury determined that the plaintiff, B. Dixon Evander & Associates, Inc., was entitled to $4,000,000.00 in punitive damages from Alexander & Alexander and $1,000,000.00 in punitive damages from Mary Scheeler. The issue before us is whether there was any basis for the awards of punitive damages.

I.

B. Dixon Evander is the founder, owner and principal officer of B. Dixon Evander & Associates, Inc., an insurance brokerage corporation.[1] The corporation specializes in procuring medical malpractice liability insurance for health care providers. In 1962, Evander was invited to submit a proposal for medical malpractice insurance for the University of Maryland Hospital and its staff. Evander obtained from the hospital the right to procure such insurance, and, between 1962 and 1985, Evander developed and managed a professional liability program for the hospital and its medical staff.[2]

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1 Hereinafter, B. Dixon Evander & Associates,, Inc., will simply be referred to as "Evander." The individual B. Dixon Evander will be referred to as "Mr. Evander."

2 The insurance relevant to this case consists of two professional liability insurance policies and their renewals. The policies include as named insureds the hospital and medical professionals employed by various entities that are now part of the University of Maryland Medical Systems Corporation. Hereinafter

Initially, Evander had secured insurance for the hospital from St. Paul Fire & Marine Insurance Company. In 1975, St. Paul decided to withdraw from the state's medical malpractice market, and Evander procured policies for the hospital from the Mutual Fire, Marine & Inland Insurance Company ("Mutual Fire"). Evander negotiated the Mutual Fire policies through Mutual Fire's general underwriting manager and agent, Shand, Morahan & Company, Inc. ("Shand"). Shand was a wholly-owned subsidiary of Alexander & Alexander, an insurance brokerage firm.

The Mutual Fire policies were "claims made" policies. Thus, a claim would be covered only if it were made within the policy period. Because of some unusual features of medical malpractice claims, such as the relative frequency of latent injury, the termination of a claims made policy left the insured exposed for many years to liability for events that had occurred within the policy period. This potential exposure concerned the hospital, as the hospitals financial planning was undermined by uncertainty about the number and extent of the malpractice claims which it might receive. Because of this concern, the initial Mutual Fire policies contained an Optional Extension Provision ("OEP") allowing the claims reporting period to be extended beyond the policy period in return for the payment of an additional premium. As rewritten in 1981, the OEP authorized the hospital to extend the claims reporting period indefinitely by making a single payment of 155% of the premium for the policies' final year. The OEP included the requirement that the hospital exercise the option, and pay the additional premium, within 30 days after terminating the policies. The OEP was included in each annual

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we shall refer to the named insureds collectively as the "hospital."

renewal of the policies.

Evander's relationship with the hospital continued amicably until 1984. In 1984 the hospital underwent an organizational change, becoming part of a corporate entity separate from the University of Maryland. One consequence of that change was the establishment of a committee, led by Dr. Susan S. Swift, to assess and review the hospital's insurance needs. The committee sent out "requests for proposals" to a number of insurance brokers, including Evander and Alexander & Alexander ("Alexander"). The requests for proposals asked detailed questions about the brokers' organizations and about their experience and ability in the field of professional liability insurance. After reviewing the proposals of the six brokers who responded, the committee, on behalf of the hospital, chose Alexander to succeed Evander as the hospital's broker.

On January 30, 1985, the hospital issued a "broker of record" letter, authorizing Alexander to represent its insurance interests. The letter allowed Alexander to negotiate on the hospital's behalf "as respects changes in existing insurance policies and in closing, changing, increasing or cancelling insurance. . . ." The letter specifically provided that it was "intended to include all policies presently placed with Mutual Fire through Shand, Morahan & Company."

Evander was disappointed by the hospital's decision. Mr. Evander wrote to Dr. Swift, telling her that "[h]aving initiated, developed and shepherded the current program through the past ten (10) years we feel, to be candid, as if there has been a death in the family without knowing the cause." Mr. Evander explained that he had continually modified the hospital's insurance program over the years, negotiating with Shand and Mutual Fire for concessions for his client. Under the circumstances, he wrote, it would be unfair for the hospital to appoint another broker if it

intended to renew the Mutual Fire policies because "to have [another broker] step into our shoes after establishing and developing the program, we trust you will agree is an unearned position."

Bob Liston, the Shand Vice President responsible for the hospital account, agreed with Evander. By February 1, 1985, Liston had learned that Alexander was ready to send Shand a broker of record letter from the hospital. On that date he wrote a memorandum to Joe Prochaska, Shand's Chairman, explaining that he had told Evander once, and Dr. Swift twice, that Shand would not accept a broker of record letter on the Mutual Fire policies from anyone except Evander. In support of his position, Mr. Liston noted Mr. Evander's many achievements for Shand: business worth over $39,000,000 which he had produced for Shand from Maryland, his careful attention to insurance legislation in Maryland, and his support of Shand through the implementation of sharp rate increases.

For its part, the hospital was concerned that it might lose its access to Mutual Fire. The hospital committee was reluctant to forego any options in the precarious liability insurance market, and Dr. Swift told Alexander that Alexander's continued representation of the hospital depended on an agreement from Shand that the hospital, through Alexander, could renew the existing Mutual Fire policies if the hospital chose to do so.

Joe Prochaska and Mac Calhoun, the Chairman and President of Shand, were asked to attend a meeting of top Alexander executives in Scottsdale, Arizona, in early February 1985. Prochaska and Calhoun met with the President of Alexander, Michael White. As a consequence of the meeting, White called Dr. Swift to tell her that Shand had no option but to accept the broker's letter from Alexander, and Shand did accept the letter.

At some time in early 1985, the hospital and Alexander entered into a brokerage contract. Alexander was appointed broker for the hospital for one year,[3] beginning July 1, 1985.[4] Alexander was to provide a full range of brokerage services, and the hospital was to pay a flat annual fee of $250,000, payable in monthly installments. The parties expressly noted the consequences of the flat fee arrangement, stating in their agreement that

> "[t]he fees are intended to replace the commissions associated with procuring insurance. Therefore, all insurance quotations should be obtained net of commission fees. If this is not possible a credit will be granted in an amount equal to the commission."

This provision obliged Alexander to give the hospital credit for any insurance payment by the hospital that represented commission, since Alexander would already have been paid an agreed price for its services.

After Alexander's appointment as broker, and before the July 1, 1985, date for termination of Evander's services, Evander continued to service the hospital account and to receive its commission on premiums paid by the hospital. Meanwhile, Alexander and the hospital were reviewing the range of available insurance options. Ultimately the hospital chose a system of self-insurance rather than renewal of the Mutual Fire policies. This decision was predicated on the exercise of the OEP option.

On May 6, 1985, Alexander told Shand that the hospital

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[3] The agreement provided each party with the option to withdraw on thirty days' notice to the other.

[4] The effective date of the Mutual Fire policies was July 1. Alexander and the hospital chose the anniversary and renewal date of the existing insurance coverage to begin their relationship.

would not renew the Mutual Fire policies when they expired at the end of June. Alexander also told Shand that the hospital intended to exercise the OEP option. Shand passed the news on to Evander. On May 8, 1985, Evander sent a letter to the hospital, explaining how the OEP option had to be exercised and calculating the premium for the exercise of the option. Evander also claimed a commission on the premium. The alleged prior understanding between Shand and Evander was that Evander would receive a commission of 8% of premiums on policies procured by Evander. Evander calculated the amount of the OEP premium to be over $3,000,000, and asked Shand for a commission of $265,907.28.

Evander's request for a commission on the OEP premium threatened to wipe out Alexander's entire fee from the hospital for the year beginning July 1, 1985. If Shand's bill to the hospital were to include a sum equal to Evander's commission, as the bill undoubtedly would if Shand paid Evander, then, under the terms of the fee agreement between Alexander and the hospital, Alexander would be obliged to credit the hospital with the amount of the commission. Alexander asked Shand to bill the hospital for the exercise of the option in an amount that did not include Evander's commission. Shand refused. Alexander's position was that the hospital owed no commission to anyone, since the exercise of the option was an insurance service covered by Alexander's flat fee. Shand insisted that it owed Evander a commission on the premium. Shand, however, ultimately complied with Alexander's request, and the hospital received and paid a bill for a sum which did not include an amount equal to the commission demanded by Evander. Consequently, Evander received no commission for the premium that the hospital paid to exercise its rights under the OEP provision.

Evander then brought the present action in the Circuit

Court for Baltimore City against Alexander, Shand, Mutual Fire and Mary Scheeler, an Alexander vice president and the executive responsible for the hospital account. Evander sought compensatory damages equal to the commission on the OEP and punitive damages. Evander's complaint contained fourteen counts. Only three were ultimately submitted to the jury: a breach of contract count against Shand and Mutual Fire, a count charging tortious interference with contract against Alexander, and Scheeler, and a tort count based on "civil conspiracy" against all four defendants. Evander sought only compensatory damages under the breach of contract count, but asked for both compensatory damages and $5,000,000.00 in punitive damages under each of the two tort counts.

At trial, in connection with its claim for a commission on the OEP, Evander introduced into evidence a document, "PX43," that allegedly contained the terms of a 1975 exclusive Producer's Agreement between Shand and Evander. The document, which had been sent by Shand to Evander in 1975, set out the proposed terms and conditions under which Evander was to produce medical malpractice insurance business for Shand. Evander had responded in 1975 by sending a letter to Shand explaining that PX43 did not reflect the agreement between the parties because it omitted both a ninety day notice provision for termination and an agreement that Evander's commission would remain unchanged for three years.[5] Evander's letter stated that it would sign PX43 promptly if its requested changes were made. Shand denied that there had ever been any agreement that Evander's commission would be fixed for a three year period.[6] Instead,

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[5] Evander's letter was admitted into evidence as PX44.

[6] Shand's letter was admitted into evidence as PX45.

Shand offered to "forward the necessary document" if Evander wished to execute a contract including the ninety day notice provision, but excluding the three year fixed commission. The record contains no evidence that Shand and Evander ultimately agreed on the terms of their relationship. Nonetheless, Evander took the position at the initial trial that the exclusive agreement described in PX43 gave it the sole right to receive a commission on the OEP.

Evander at the first trial also produced an expert witness in insurance matters, who testified that a party who produces an insurance policy is, according to custom and usage in the insurance industry, entitled to receive the commission on an OEP exercised when the policy is terminated. In addition, Mr. Evander testified to the course of his dealings with Shand and Mutual Fire over the years.

In connection with evidence of "malice," a component of both the tortious interference claim and the request for punitive damages, Mr. Evander was permitted, over objection, to testify to comments allegedly made by Mary Scheeler. Mr. Evander told the jury that a vice president of Shand had told him during a telephone conversation that Scheeler "hates your ass" and intended to drive him out of business. Similar testimony from Evander's former office manager was also admitted.

The jury found for Evander under the breach of contract count and further found that "the precise commissions that Evander lost" were $250,052.52 plus interest. The jury also found Alexander and Scheeler liable under both tort counts. The verdict sheet did not require the jury to assess separate compensatory damages on these counts; the parties had agreed that, if there was liability under the tort counts, the compensatory damages would be the same as under the contract count. The jury found that Alexander and Scheeler had tortiously interfered with a

contractual relationship between Evander and Shand, and had done so with actual malice. Furthermore, the jury found that "Alexander and Scheeler. . . entered into a conspiracy with Shand and Mutual Fire . . . to deprive Evander of commissions . . . ." The jury found all the defendants liable for punitive damages under the tort counts, although the verdict sheet did not allocate punitive damages between the two tort counts.[7] The jury assessed the amounts of punitive damages as follows: $40,000,000.00 against Alexander; $250,052.52 against Scheeler; and $70,104.15 against Shand and Mutual Fire.

The trial court reduced the amount of the punitive damages awarded against Alexander to $12,500,000.00. Alexander and Scheeler appealed, challenging both the determinations of liability and the awards of punitive damages. Alexander and Scheeler argued, *inter alia*, that there was no basis for a finding of actual malice. In this connection, they argued that evidence of Mary Scheeler's alleged statements had been improperly admitted. For reasons that do not appear in the record, Evander abandoned and released its claim for punitive damages against Shand and Mutual Fire before the case was argued in the Court of Special Appeals.[8]

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[7] In this connection, *see Caldor v. Bowden*, 330 Md. 632, 660-664, 625 A.2d 959, 972-974 (1993).

[8] Since Shand and Mutual Fire were parties to the alleged contractual arrangement for commissions, Shand and Mutual Fire could not be liable for tortiously interfering with that contractual arrangement. *See, e.g., Travelers Indemnity v. Merling*, 326 Md. 329, 343, 605 A.2d 83, 89, *cert. denied*, 113 S.Ct. 465, 121 L.Ed.2d 373 (1992); *K & K Management v. Lee*, 316 Md. 137, 154-156, 557 A.2d 965, 973-974 (1989); *Sharrow v. State Farm Mutual*, 306 Md. 754, 763, 511 A.2d 492, 497 (1986). Consequently, the count charging interference with contractual relations was submitted to the jury only against Alexander and Scheeler. Awarding punitive damages for breach of contract is

The Court of Special Appeals upheld the award of compensatory damages under all three counts. With respect to punitive damages, however, the Court of Special Appeals vacated the awards and ordered a new trial. As the court explained, "[t]his was, at bottom, a commercial dispute between two

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"[c]ontrary to the settled policy of Maryland law," *K & K Management, supra*, 316 Md. at 169, 557 A.2d at 981. Therefore, the punitive damages against Shand and Mutual Fire must have rested on the "civil conspiracy" tort count.

In this connection, we note that "conspiracy" is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff. As Judge Alvey said for this Court in *Kimball v. Harman and Burch*, 34 Md. 407, 410-411 (1871), "an act which, if done by one alone, constitutes no ground of action on the case, cannot be made the ground of such action by alleging it to have been done by and through a conspiracy of several." Later, as Chief Judge, he further explained for the Court in *Robertson v. Parks*, 76 Md. 118t 135, 24 A. 411, 413 (1892):

> "[I]t is a general rule, that a conspiracy cannot be made the subject of a-civil action, unless something is done which, without the conspiracy, would give a right of action. The damage done is the gist of the action, not the conspiracy. When the mischief contemplated is accomplished, the conspiracy becomes important, as it may affect the means and measure of redress. The party wronged may look beyond the actual participants in committing the injury, and join with them as defendants all who conspired to accomplish it; and the fact of the conspiracy may aggravate the wrong; but the simple act of conspiracy does not furnish a substantive ground of action."

See also Green v. Wash. Sub. San. Comm'n, 259 Md. 206, 221, 269 A.2d 815, 824 (1970); *Rent-a-Car Co. v. Fire Ins. Co.*, 161 Md. 249, 260, 156 A. 847, 852 (1931); *Brinkley v. Platt*, 40 Md. 529, 536 (1874).

As pointed out above, a party to contractual relations cannot be liable for the interference tort based on those contractual relations. The tort is aimed at the person who interferes with the contract, and not at one of the contracting parties. We do not believe that this principle can be circumvented by the "conspiracy" device.

business competitors." *Alexander v. Evander*, 88 Md.App. 672, 719, 596 A.2d 687, 710 (1991). Reviewing the trial court's proceedings in light of *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), a case decided after the judgment against Alexander had been rendered, the intermediate appellate court concluded that "[o]n this record, we do not believe that a $12.5 million punitive award comports with due process." *Alexander v. Evander*, *supra*, 88 Md.App. at 720, 596 A.2d at 710. The court remanded the case for a new trial, limited to "the issue of whether [the defendants'] conduct justifies an award of punitive damages and, if so, in what amount." 88 Md.App. at 722, 596 A.2d at 711-712.

The Court of Special Appeals' opinion was somewhat confusing with respect to the new trial. The court stated that the second jury should be instructed to assume as facts the specific findings listed on the first jury's verdict sheet, including the facts that Alexander and Scheeler tortiously interfered with a contract of Evander's, and that they did so with actual malice. 88 Md.App. at 722 and n. 14, 596 A.2d at 712 and n. 14. Nevertheless, the Court of Special Appeals also directed that the second jury should be given a definition of actual malice and told that actual malice is a requirement for an award of punitive damages. 88 Md.App. at 722, 596 A.2d at 712. The intermediate appellate court did not address Alexander's and Scheeler's contention that the trial court's instructions on actual malice had been inadequate.[9]

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[9] In fact, the jury at the first trial was never given an actual malice instruction with respect to Alexander and Scheeler. Actual malice was defined for the jury only in connection with a conspiracy instruction. Later, the jury was told that it could award punitive damages against Shand and Mutual Fire if it found that Shand and Mutual Fire had committed "tortious action in addition to a breach of contract." The instructions did not mention Alexander as a party

Both sides petitioned this Court for a writ of certiorari. In particular, Alexander and Scheeler in their petition argued that Evander had failed to establish its tortious interference claim because "at least three, and probably *all*" of the elements of the tort had not been proven. Evander, on the other hand, challenged the trial court"s grant of summary judgment in favor of the defendants on counts alleging fraud, fraudulent concealment, conversion and conspiracy to commit each of those torts. In light of the remand for a new trial on punitive damages, we denied both petitions. *Alexander & Alexander, Inc. v. B. Dixon Evander & Assoc.*, 323 Md. 1, 590 A.2d 158 (1991).

Prior to the new trial, Alexander paid Evander the compensatory damages award, with interest, on its own behalf and on behalf of Shand and Scheeler. By the time of the second trial, Evander had dismissed its claims for punitive damages against Shand and Mutual Fire. Alexander and Scheeler were the only remaining defendants, and tortious interference with contractual relations was the only legal theory for the recovery of punitive damages.

The punitive damages retrial lasted over three and a half weeks. Evander presented largely the same evidence which it had at the first trial, with the addition of evidence of Alexander's net worth.

At the second trial, Alexander challenged Evander's characterization of PX43 as a writing that formally embodied the

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to the conspiracy, and punitive damages were not mentioned in connection with the tortious interference instruction directed at Alexander and Scheeler. Alexander and Scheeler specifically objected at trial to the court's failure to give the actual malice instruction that they requested in connection with the tortious interference count, and they argued on appeal that the trial court had inadequately instructed the jury with respect to actual malice.

relationship between Evander and Shand. Alexander introduced evidence that Mr. Evander had testified at an unrelated trial that PX43 had never been executed or agreed to. Moreover, at the unrelated trial, Mr. Evander had claimed that, even if PX43 did reflect an informal agreement, it had been cancelled and terminated in October 1975. At the punitive damages retrial in this case, Alexander questioned Mr. Evander about this testimony, and Mr. Evander acknowledged that PX43 had been cancelled.

As previously discussed, at the first trial Mr. Evander had testified, over hearsay objections, to comments allegedly made by Mary Scheeler about her attitude towards Mr. Evander and his business. At the retrial, the court excluded this evidence on the ground that it was "inflammatory" and inadmissible hearsay.

At the conclusion of the second trial, the trial court, over the defendants' objection, instructed the jury as follows:

"You are to assume as fact the following:

> One, that Shand. . . and Mutual Fire . . . had a contract with the plaintiff that entitled the plaintiff to a commission on the [OEP];
>
> Two, that Shand and Mutual Fire breached or broke that contract with the plaintiff;
>
> Three, that the defendants, Alexander & Alexander, and Scheeler, tortiously interfered with the plaintiff's contract with Shand and Mutual Fire . . . . That this tortious interference by the defendants . . . was done with actual malice."

The court further instructed the jury that "actual malice is the performance of an act without legal justification or excuse but with evil or rancorous motive influenced by hate, spite or ill

will, the purpose being to deliberately and wilfully injure the plaintiff." The court told the jury that it could award punitive damages or not, as it saw fit, and explained that Evander had the burden of proving its entitlement to punitive damages by "a preponderance of the evidence."

The defendant made several objections to the court's instructions, including, *inter alia*, an objection to the instruction that Evander must prove its entitlement to punitive damages by a preponderance of the evidence, rather than by clear and convincing evidence.[10]

The second jury awarded punitive damages against Alexander in the amount of $4,000,000.00 and against Scheeler in the amount of $1,000,000.00.[11]

The defendants appealed to the Court of Special Appeals and Evander cross-appealed. Prior to any proceedings in the intermediate appellate court, both sides filed petitions for a writ - of certiorari which this Court granted, 331 Md. 284, 627 A-2d 1063 (1993). In this Court, the defendants argue, *inter alia*, that the evidence shows that no tort was ever committed,[12] that there was no evidence of actual malice, and that the punitive damages

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[10] After the Court of Special Appeals had reviewed the first trial but before the retrial on punitive damages had begun, we decided *Owens-Illinois v. Zenobia*, 325 Md. 420, 469, 601 A.2d 633, 657 (1992), which, *inter alia*, requires a plaintiff to establish entitlement to punitive damages by clear and convincing evidence.

[11] It had been made clear at trial that Alexander would pay any damages awarded against Scheeler.

[12] The primary ground for this argument is Alexander's and Scheeler's contention that PX43, the "contract" which formed the basis of Evander's tortious interference claim, never existed.

award should be set aside because it was not "rendered with meaningful standards." Evander complains about the exclusion from the second trial of evidence concerning the alleged statements attributed to Mary Scheeler.

II.

Punitive damages may be awarded only, *inter alia*, if there was tortious conduct accompanied by "malice." *Owens-Illinois v. Zenobia*, 325 Md. 420, 454-460, 601 A.2d 633, 650-653 (1992). Consequently, while the award of compensatory damages in favor of Evander is not directly before us, the question of whether there was tortious conduct in this case is obviously pertinent in deciding the allowability of punitive damages. Since "the availability of a punitive damages award ought to depend upon the heinous nature of the defendants tortious conduct," *Zenobia*, 325 Md. at 454, 601 A.2d at 649 (emphasis added), if no tort was committed there can be no basis for a punitive damages award. Moreover, in this particular case, Evander has relied on identical alleged facts to show both the presence of the tort and the actual malice required for the allowability of punitive damages. Under Evander's theory, Alexander's interference with the contractual relationship between Evander and Shand was wrongful, and accompanied by actual malice, because of the ill-will and spite towards Evander disclosed by statements allegedly made by Mary Scheeler.

Maryland recognizes the tort action for wrongful interference with contractual or business relationships in two general forms: "inducing the breach of an existing contract and, more broadly, maliciously or wrongfully interfering with economic relationships . . ." *Natural Design, Inc. v. Rouse Co.*, 302 Md. 47, 69, 485 A.2d 663, 674 (1984). We explained in the *Natural Design* opinion as follows (302 Md. at 69-70, 485 A.2d at 674):

> "The principle underlying both forms of the tort is the same: under certain circumstances, a party is liable if he interferes with and damages another in his business or occupation. The two types of actions differ in the limits on the right to interfere which will be recognized in either case. Thus, where a contract between two parties exists, the circumstances in which a third party has a right to interfere with the performance of that contract are more narrowly restricted. A broader right to interfere with economic relations exists where no contract or a contract terminable at will is involved. *See generally Goldman v. Building Assn.*, 150 Md. 677, 682, 133 A. 843 (1926); *Sumwalt Co. v. Knickerbocker*, 114 Md. 403, 414-4151 80 A. 48 (1911)."

See also Macklin v. Logan, 334 Md. 287, 297, 639 A.2d 112, 117 (1994); *K & K Management v. Lee*, 316 Md. 137, 154-155, 557 A.2d 965, 973 (1989); *Sharrow v. State Farm Mutual*, 306 Md. 754, 763, 511 A.2d 492, 497 (1986).

Earlier in this litigation, Evander appeared to argue that Alexander and Scheeler tortiously interfered with a specific, subsisting contract between Evander and Shand which gave Evander the exclusive right to a commission on the OEP premium. This contract was the one allegedly described in PX43. At the second trial and in the present appellate proceedings, however, Evander no longer contends that PX43 is the primary source of its right to a commission on the OEP premium. The Court of Special Appeals, after reviewing the record of the first trial, concluded that "Evander's right to a commission on the OEP . . . arose from an admixture of the 1975 producer's agreement with Shand and the 1975 policy procured by him from Shand/Mutual Fire, as renewed through June, 1985," and that the "producers agreement and the Mutual Fire policy were constituent parts of an overall business arrangement between Evander, on the

one hand, and Shand and Mutual Fire, on the other." 88 Md. App. at 687, 685-686, 596 A.2d at 694, 693. Evander's brief in this Court represents that Evander's "entitlement to a commission resulted from PX43 and Mr. Evander's understandings, his agreements and his practices with Shand over a 10-11 year period." (Evander's brief at 6). Counsel for Evander stated at oral argument before this Court that Evander's claim to the commission was not based on the alleged exclusivity agreement between itself and Shand, but on custom, usage and the overall course of dealings between the parties.

Consequently, this case does not involve an alleged wrongful interference with a specific, discrete contract between Evander and Shand but interference with an ongoing business relationship that included Evander's entitlement to a commission upon the hospitals exercise of the OEP option. This case thus implicates the broader form of the tort, namely malicious or wrongful interference with economic relationships.[13]

The elements of the broader form of the tort have remained unchanged in Maryland since this Court articulated them in *Willner v. Silverman*, 109 Md. 341, 355, 71 A. 962, 964 (1909) (quoting from *Walker v. Cronin*, 107 Mass. 555, 562 (1871)):

> "'(1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and

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[13] Even if Evander were to rely primarily on the 1975 producer's agreement, PX43, the case would involve the broader form of the tort. By its terms, PX43 was terminable at will by either party. Interference with a contract terminable at will is analyzed as interference with economic relations broadly, and not interference with a specific contract. *Macklin v. Logan*, 334 Md. 287, 304-308, 639 A.2d 112, 120-122 (1994).

> loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting.'"

See *K & K Management v. Lee*, *supra*, 316 Md. at 160, 557 A.2d at 973; *Natural Design, Inc. v. Rouse Co.*, *supra*, 302 Md. at 71, 485 A.2d at 675. Moreover, for punitive damages to be recoverable under either form of the tort, the wrongful interference with contract or economic relations must be accompanied by "actual malice," i.e., conduct by the defendant characterized by evil motive, intent to injure, ill will, or fraud. *See, e.g., Schaefer v. Miller*, 322 Md. 297, 317, 587 A.2d 491, 501 (1991) (concurring opinion); *Rite Aid Corp. v. Lake Shore Inv.*, 298 Md. 611, 626-627, 471 A.2d 735, 742-743 (1984); *Damazo v. Wahby*, 259 Md. 627, 638, 270 A.2d 814, 819 (1970); *Knickerbocker Co. v. Gardiner Co.*, 107 Md. 556, 569-570, 69 A. 405, 410 (1908).[14]

The malicious interference tort generally arises in a commercial setting. Participants in the economic marketplace are expected to act aggressively in seeking business and furthering

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[14] This Court's opinion in *Rite Aid Corp. v. Lake Shore Inv.*, *supra*, 298 Md. at 627, 471 A.2d at 743, quotes Chief Judge Hammond for the Court in *Damazo v. Wahby*, *supra*, 259 Md. at 638, 270 A.2d at 819, as follows:

> "'The Maryland rule is that malice in the sense of deliberate and improper violation of a known right, that is, absence of legal justification, will support an action and permit recovery of compensatory damages for deprivation of known contractual rights but that actual malice must be shown to support punitive damages.' *Id.* at 638 270 A. 2d 814."

their own position in the market.[15] "In the rough and tumble of the marketplace, competitors inevitably damage one another in the struggle for personal advantage." *Leigh Furniture and Carpet Co. v. Isom*, 657 P.2d 293, 307 (Utah 1982). Courts and commentators have often found it difficult to determine when purposeful interference with business relationships, behavior that is an integral part of commercial competition, should be considered "wrongful" so as to give rise to a cause of action in tort.[16]

This Court has long recognized that self-interested commercial dealing has its proper place in the business world, Thus, in *Goldman v. Building Assn*, 150 Md. 677, 684, 133 A. 843, 846 (1926). the Court stated:

> "'Iron sharpeneth iron,' is ancient wisdom, and the law is in accord in favoring free competition, since ordinarily it is essential to the general welfare of society, notwithstanding competition is not altruistic but is fundamentally the play of interest against interest, and so involves the interference of the successful competitor

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[15] The law has long recognized business competition as deserving of protection. *See generally* Bruce Wyman, *Competition and the Law*, 15 Harv. L. Rev. 427 (1902) (discussing the historical progression of competition cases from the fifteenth century to the beginning of the twentieth); Franklin D. Jones, *Historical Development of the Law of Business Competition*, 35 Yale L.J. 905, 36 Yale L.J. 42, 36 Yale L.J. 207, and 36 Yale L.J. 351 (1926) (describing aspects of the social history of England and America that affected the law of business competition from the early thirteenth century until 1925).

[16] The idea that a tort is a "wrong" is embodied in the notion of fault that lies at the heart of Maryland tort law. *See Nissen Corp v. Miller*, 323 Md. 613, 623, 594 A.2d 564, 569 (1991) ("[I]n adopting the cause of action for strict liability in tort, this Court has not abandoned the fundamental concept of fault.")

> with the interest of his unsuccessful competitor in the matter of their common rivalry. Competition is the state in which men live and is not a tort, unless the nature of the method employed is not justified by public policy, and so supplies the condition to constitute a legal wrong."

See also Macklin v. Logan, supra, 334 Md. at 302, 639 A.2d at 119; *Natural Design, Inc. v. Rouse, supra*, 302 Md. at 72-73, 485 A.2d at 676. Accordingly, we have made clear in our cases that acting to pursue one's own business interests at the expense of others is not, in itself, tortious. *Macklin v. Logan, supra*, 334 Md. at 304-305, 639 A.2d at 120-121; *Goldman v. Building Assn, supra*, 150 Md. at 684-686, 133 A. at 846; *Klingel's Pharmacy v. Sharp & Dohme*, 104 Md. 218, 232, 64 A. 1029, 1031 (1906).

Moreover, this court has refused to adopt any theory of tortious interference with contract or with economic relations that "converts a breach of contract into an intentional tort."[17] *K & K Management, supra*, 316 Md. at 169, 557 A.2d at 981. The distinction between tort and contract actions in this context is significant. A successful plaintiff in a tortious interference case is not limited to the contract measure of damages, the benefit of the bargain, *Beard v. S/B Joint Venture*, 321 Md. 126,

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[17] Commentators note that the law should at least tolerate, if not favor, breach of contract "if B can breach a contract with A, pay damages to A, and still come out ahead. . . ." Dan B. Dobbs, *Tortious Interference with Contractual Relationships*, 34 Ark. L. Rev. 335, 360 (1980). See also Harvey S. Perlman, *Interference with Contract and other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. Chi. L. Rev. 61, 79-91 (1982); Donald C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test*, 40 U. Miami L. Rev. 487, 506-508 (1986).

133, 581 A.2d 1275, 1278 (1990), but can recover "the more extensive tort damages." *Rite Aid Corp. v. Lake Shore Inv., supra*, 298 Md. at 622, 471 A.2d at 740-741. Those damages "include the pecuniary loss of the benefits of the contract, consequential losses for which the tortious act is the legal cause, emotional distress and actual harm to reputation. . . .and, in appropriate circumstances, punitive damages." 298 Md. at 622, 471 A.2d at 740."[18]

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[18] In this connection, we note that in some other jurisdictions the distinction between breach of contract and tortious interference has been somewhat obscured. In 1969, Dean Prosser summarized numerous cases nationwide as holding that a person who "purposely interfered with somebody else's business" would be prima facie liable for the tort of malicious interference, and would bear "the burden of justifying his conduct by competition." 46 A.L.I. Proc. 196 (1969). This analysis was described as "reach[ing] the astounding result that the competitive order which we hold out to the world as a model is prima facie illegal." *Id.* at 201.

Even in our opinions, some language suggests that when a plaintiff relies upon interference with a specific contract, purposeful interference itself triggers liability. *See, e.g., Cumberland Glass Mnf'g Co. v. DeWitt*, 120 Md. 381, 394-395, 87 A. 927, 932 (1913), aff'd 237 U.S. 447, 35 S.Ct. 636, 59 L.Ed. 1042 (1915); *Knickerbocker Co. v. Gardiner Co.*, 107 Md. 556, 564, 69 A. 405, 408 (1908). On the other hand, we have on occasion specifically rejected this analysis. *See Travelers Indemnity v. Merling, supra*, 326 Md. at 343, 605 A.2d at 90 (deliberate interference could not provide basis for tort where it was not "wrongful or unlawful"); *Sharrow v. State Farm Mutual, supra*, 306 Md. at 764-765, 511 A.2d at 498 (intentional breach of an existing contract only tortious if "wrongful or improper").

Since this case concerns only the broader form of the tort, which unquestionably requires more than purposeful interference, we need not further explore this matter. Nevertheless, we note that legal scholars are generally critical of the broad scope of the malicious interference tort in many jurisdictions. *See, e.g.*, Francis Bowes Sayre, *Inducing Breach of Contract*, 36 Harv. L. Rev. 663 (1923); Dan B. Dobbs, *Tortious interference with Contractual Relationships, supra*, 34 Ark. L. Rev. at 335; Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies, supra*, 49 U. Chi.

The tort of wrongful or malicious interference with economic relations requires intentional acts "'done with the unlawful purpose to cause. . . damage and loss [to the plaintiffs in their lawful business], without right or justifiable cause on the part of the defendants (which constitutes malice). . . '" *Willner v. Silverman*, *supra*, 109 Md. at 355, 71 A. at 964. In *Natural Design, Inc. v. Rouse Co.*, *supra*, 302 Md. at 71, 485 A.2d at 675, we reviewed our prior cases and noted that various factors might supply the element of malice under appropriate circumstances. *See, e.g., Willner v. Silverman*, *supra*, 109 Md. at 357, 71 A. at 964 (actual malice, such as ill will or spite); *McCarter v. Chamber of Commerce*, 126 Md. 131, 136, 94 A. 541, 542 (1915) ("'wrongful act done intentionally without just cause or excuse'"); *Goldman v. Building Assn.*, *supra*, 150 Md. at 682, 133 A. at 846 (unlawful acts). In *Natural Design*, the Court held that acts of interference committed in violation of a state antitrust statute constituted acts of wrongful or malicious interference.

In *K & K Management v. Lee*, *supra*, 316 Md. at 160-165, 557 A.2d at 975-979, we explained that an act of tortious interference with economic relations is characterized by the defendant's specific purpose to interfere, and that acts which incidentally affect another's business relationships are not a sufficient basis for the tort. In particular, the Court declined to hold that the tort would lie wherever an intentional breach of contract would foreseeably impinge upon a contracting party's economic relations with others. 316 Md. at 168-169, 557 A.2d at 980-981.

L. Rev. at 61; Donald C. Dowling, Jr., *Beyond the Unlawful Means Test*, *supra*, 40 U. Miami L. Rev. at 487.

The Court in *Travelers Indemnity v. Merling*, 326 Md. 329, 343, 605 A.2d 83, 90, *cert. denied*, 113 S.Ct. 465, 121 L.Ed.2d 373 (1992), reiterated that "[f]or one to recover for tortious interference with contractual or economic relations, the interference must have been wrongful or unlawful." We held that an insurance company was not liable for the tort of wrongful or malicious interference when the alleged act of interference constituted the insurer's compliance with a state statute.

Most recently, we held in *Macklin v. Logan*, *supra*, 334 Md. at 301, 639 A.2d at 119, that malicious interference with economic relations requires "both a tortious intent and improper or wrongful conduct." In particular, the Court emphasized that tortious intent alone, defined as an intent "to harm the plaintiff or to benefit the defendant at the expense of the plaintiff" (*ibid.*), was not sufficient to turn deliberate interference into a tort, but that the defendant must interfere through improper or wrongful means. 334 Md. at 302, 639 A.2d at 119.

Therefore, wrongful or malicious interference with economic relations is interference by conduct that is independently wrongful or unlawful, quite apart from its effect on the plaintiff's business relationships. Wrongful or unlawful acts include common law torts and "'violence or intimidation, defamation, injurious falsehood or other fraud, violation of criminal law, and the institution or threat of groundless civil suits or criminal prosecutions in bad faith.'" *K & K Management v. Lee*, *supra*, 316 Md. at 166, 557 A.2d at 979, quoting Prosser, *Law of Torts*, Sec. 130, 952-953 (4th ed. 1971).

In addition, "actual malice," in the sense of ill will, hatred or spite, may be sufficient to make an act of interference wrongful where the defendant's malice is the primary factor that motivates the interference. See *Willner v. Silverman*, *supra*, 109 Md. at 357, 71 A. at 964; *Leigh Furniture and Carpet Co. v.*

Isom, supra, 657 P.2d at 307; *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 843, 320 N.W.2d 759, 763 (1982); *Alyeska Pipeline Service v. Aurora Air Service*, 604 P.2d 1090, 1094 (Alaska 1979); *Kecko Piping, Inc. v. Town of Monroe*, 172 Conn. 197, 202, 374 A.2d 179, 182 (1977); *Heavener, Ogier Services v. R. W. Fla. Region*, 418 So.2d 1074, 1077 (Fla. App. 1982); Prosser, *Law of Torts*, 953 (4th ed. 1971); Restatement (Second) of Torts, Sec. 768, comment g (1977).

Evander has not argued that Alexander's acts of interference were malicious because they were illegal.[19] Neither has it claimed that Alexander's conduct was independently tortious. Evander has based its theory of tortious interference as well as its claim for punitive damages, on the existence of actual malice allegedly established by statements attributed to Mary Scheeler.

We note that under the circumstances of this case Evander carried a heavy burden in trying to establish the interference tort through proof of actual malice. As explained in *Macklin v. Logan, supra*, 334 Md. at 305-308, 639 A.2d at 121-122, under the broader form of the tort, acts of interference with economic relations do not become tortious simply because the defendant carries them out with a wrongful intent. Proof that

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[19] In connection with its civil conspiracy claim, Evander argued that Alexander's actions violated Maryland's anti-rebating statute, Maryland Code (1957, 1994 Repl. Vol.), Art. 48A, Sec. 226. Nevertheless, Evander has never argued that the statute is pertinent to establishing that the interference with Evander's contract or economic relations was tortious because it was unlawful. The Court of Special Appeals discussed the statute only in the context of the conspiracy claim. *Alexander v. Evander*, 88 Md. App. 672, 694-703, 596 A.2d 687, 697-702 (1991). The parties have not briefed or argued the issue in this Court. Therefore, we need not explore, in this case, the meaning and scope of the anti-rebating statute.

Alexander harbored animosity towards Evander when it interfered with Evander's economic relationship with Shand would not sustain the tort if Alexander's animosity was incidental to its pursuit of legitimate commercial goals.

It would appear that Alexander's acts were undertaken pursuant to legitimate commercial goals. Evander, however, suggests otherwise because Alexander influenced decisions at Shand while Shand was a wholly-owned subsidiary of Alexander. In Evander's view, the relationship between Alexander and Shand made Alexander's exercise of influence over Shand particularly objectionable. In fact, that relationship gave Alexander further legitimate reasons for acting as it did. A parent corporation is generally justified in requiring its subsidiary to modify economic arrangements, contractual or otherwise, if those arrangements do not benefit the parent. Under these circumstances, interference by the parent is ordinarily not tortious. *Green v. Interstate United Management Serv. Corp.* 748 F. 2d 827, 831 (3d Cir. 1984) (applying Pennsylvania law); *Phil Crowley Steel Corp. v. Sharon Steel Corp.*, 702 F.2d 719, 722 (8th Cir. 1983) (applying Missouri law); *Bendix Corp. v. Adams*, 610 P.2d 24, 31-32 (Alaska 1980); *Culcal Stylco, Inc. v. Vornado, Inc.*, 26 Cal.App.3d 879, 882, 103 Cal. Rptr. 419, 421, (1972); *Felsen v. Sol Cafe Mfg. Corp.*, 24 N.Y.2d 682, 687, 301 N.Y.S.2d 610, 613-614, 249 N.E.2d 459, 461 (1969); *Coniff v. Dodd, Mead & Co.*, 593 F.Supp. 266, 269 (S.D.N.Y. 1984); *James M. King & Assoc. v. G. D. Van Wagenen Co.*, 717 F. Supp 667, 681 (D. Minn. 1989); *City of Warrensburg, Mo. v. RCA Corp.*, 571 F.Supp. 743, 751 (W.D. Mo. 1983). See *United v. Potts & Callahan*, 231 Md. 552, 560, 191 A.2d 570, 574 (1963);

Restatement (Second) of Torts, Sec. 769.[20] *See also Juengel Const. Co., Inc. v. Mt. Etna, Inc.*, 622 S.W.2d 5100 516 (Mo. App. 1981) (affirming liability based on parent corporations "arbitrary and whimsical interference" with its subsidiary's contract, and where parent's pecuniary interest was not threatened).[21]

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[20] Section 769 of the Restatement provides that an entity or individual with a financial interest in another's business does not interfere improperly with that other's economic relationships if the interferer acts lawfully "to protect his interest from being prejudiced by the relation."

Comment e to the section states as follows:

> "The rule stated in this Section applies for the purpose of protecting the actor's interest. If his conduct is directed to that end, it is immaterial that he also takes a malicious delight in the harm caused by his action; if his conduct is not so directed and is designed solely for some other aim, such as the gratification of his ill will, he is not entitled to the protection of the rule in this Section."

[21] It is not clear under Maryland law whether the interference tort lies where the plaintiff's contract or economic relations are with a corporation, and the defendant in the interference action is a controlling officer or stockholder (including parent corporation) of the contracting corporation. Although some jurisdictions have found tortious conduct under these circumstances, they have generally limited tort liability to situations in which the controlling individual or entity acted in bad faith. *See generally* Thomas G. Fischer, *Liability of Corporate Director, Officer, or Employee for Tortious interference with Corporation's Contract with Another*, 72 A.L.R.4th 492 (1989, 1994 Supp.). Under Maryland law, it could be argued that the analytical framework for the tort, as set out in *K & K Management v. Lee*, *supra*, 316 Md. at 154-156, 557 A.2d at 973-974, and *Travelers Indemnity v. Merling*, *supra*, 326 Md. at 343, 605 A.2d at 89-90, does not exist where the entity that controls a corporation is sued for interfering with that corporation's contracts. *See Deauville Corp. v. Federated Dept. Stores, Inc.*, 756 F.2d 1183, 1197 (5th Cir. 1985) ("the interests of [parent and subsidiary] are aligned so closely that we have difficulty even recognizing their separate identities for the purpose of this [tortious interference] analysis"). We do not reach this question in the present case.

The relationship between Alexander and Shand gave Alexander a direct financial stake in Shand's business relationships with other entities. Alexander was generally justified in directing Shand not to continue relationships that Alexander saw as detrimental to its own long-term financial interests. Provided that Alexander acted to protect these interests, it would not be liable in tort for interfering with Shand's economic relationships even if it harbored an incidental animosity towards Evander.

Even assuming, arguendo, that proof of ill will or spite could sustain the tort under these circumstances, Evander utterly failed to prove such ill will or spite. At the first trial, Mr. Evander was permitted to testify, over hearsay objections, to his recollection of a telephone conversation with Bob McDonald, Shand executive. During that conversation McDonald reportedly told Mr. Evander that Mary Scheeler had said that she was going to put Mr. Evander out of business and "that she hates your ass and she's going to get you." The record does not reveal to whom these statements were supposedly made.[22]

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[22] Interestingly, when Mr. Evander was asked at his deposition in 1988 whether or not he had any reason to suspect that Alexander had acted towards him with spite, he had answered "I only know of a remark that came to me second or third hand that Mary Scheeler was going to put me out of business." Pressed to identify the source of the remark, Dixon Evander repeatedly stated that he could not remember it. Nonetheless, at trial in 1990 Mr. Evander confidently traced the comments to the telephone call with McDonald, saying "I remember that conversation quite well."

In deposition testimony introduced as evidence at the first trial, Mr. McDonald denied having made any such remarks to Mr. Evander.

Similar testimony admitted at the first trial, but not at the second trial, was elicited from Edna Watterscheidt, Evander's former office manager. Ms. Watterscheidt was permitted to testify at the first trial, again over defense objections, that McDonald had told her "on numerable occasions" that Evander "got the shaft. We were screwed and we were f------." Questioned about what she meant by this testimony, Watterscheidt conceded that McDonald was describing in colorful terms his opinion of the fact that Evander would not get a commission on the OEP premium.

Mr. Evander's account of what McDonald allegedly told him that Mary Scheeler had said was hearsay within hearsay. Evander argues that this hearsay was improperly excluded at the second trail, Evander contends that it was admissible because it consisted of statements made by Mary Scheeler to her "co-conspirators."

Evander's argument is without merit. The record does not clearly show who was the recipient of Scheeler's alleged statements. Even if we assume that Scheeler made such comments to McDonald himself, there is no evidence that McDonald was involved in any kind of conspiracy to deprive Evander of a commission. On the contrary, Evander's own evidence showed that Shand's employees adamantly supported Evander until Alexander's president told Shand's two top executives that Shand must work with Alexander on Alexander's terms. There is no evidence that McDonald, who was not one of these top executives, ever took any position adverse to Evander's interests. Under the circumstances, there is no basis for Evander's claim that McDonald was a participant in a conspiracy against Evander. Accordingly, even if the hearsay exception for the statements of co-conspirators were otherwise applicable, it cannot

help Evander here. *See Daugherty v. Kessler*, 264 Md. 281, 291, 286 A.2d 95, 100 (1972).

Edna Watterscheidt's testimony does not refer to any statements allegedly made by Scheeler. Instead, Ms. Watterscheidt testified to what McDonald had told her about his opinion of the denial of commission to Evander. The co-conspirators exception to the hearsay rule simply does not apply to this testimony.[23]

Accordingly, we hold that the trial court correctly excluded all evidence of McDonald's alleged statements from the second trial. In light of the complete absence of other evidence of malice at the second trial, we can only conclude that the second jury reached its verdict because the court instructed it to find as a fact that Alexander and Scheeler had committed tortious interference with actual malice.[24]

Evander's evidence of actual malice at the first trial also consisted of the statements attributed to Mary Scheeler. We have held that the trial court at the first trial erred in admitting that

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[23] Indeed, Evander does not even attempt in its brief to apply the exception to the Watterscheidt testimony. Neither does it offer any alternative theory of admissibility for the evidence.

[24] Evander argues that it introduced further "malicious evidence" in the form of testimony that Scheeler "falsely accused [Mr. Evander] of improperly and unnecessarily collecting a state tax." (Evander's reply brief at 5). While it is true that Evander's trial counsel forcefully suggested to Ms. Scheeler that she had made such accusations, Scheeler repeatedly denied that she had done so. On the contrary, Scheeler explained that her investigation of taxes paid by the hospital in connection with the insurance policies was simply a part of her overall review of her new client's insurance transactions.

Evander has pointed to no testimony or other evidence that Scheeler made accusations against Evander, and we have found none in the record.

evidence. Thus, at both trials, Evander failed to offer sufficient admissible evidence of actual malice for this issue to have been submitted to either jury.

Evander failed to establish that the defendants' interference with economic relations was wrongful or malicious, and thus failed to prove the existence of tortious conduct. Moreover, even if we were to assume arguendo the existence of tortious conduct, Evander failed to establish the requisite actual malice to support an award of punitive damages.[25]

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY UPON THE PLAINTIFF'S CLAIMS FOR PUNITIVE DAMAGES AGAINST ALEXANDER & ALEXANDER AND MARY D. SCHEELER REVERSED, AND CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO ENTER JUDGMENTS ON THOSE CLAIMS IN FAVOR OF ALEXANDER & ALEXANDER AND MARY D. SCHEELER. PLAINTIFF TO PAY COSTS.

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[25] In light of our holding that there was no basis for any award of punitive damages, we need not in this case reach Alexander's alternative arguments that the punitive damages awards were disproportionate to Evander's injury and Alexander's culpability, and that the awards failed to satisfy due process requirements.